STATE OF ARKANSAS:

Office of State Land Commissioner, Little Rock.

I, L. L. Coffman, Commissioner of State Lands for the State of Arkansas hereby certify that the foregoing pages 3 to 60 inclusive contain a true and correct copy of the Field Notes for that part of Twp. 12 N. R. 7 E. as is called for in the index, as the same appears in the original Field Note book of said Twp. now on file in this office.

Witness my hand and official seal this 14th day of Nov. 1907.

[SEAL.] LAFAYETTE L. COFFMAN,
Com. State Lands.

(Here follow diagrams marked pages 79, 80, 81, and 82.)

Endorsed on cover: File No. 22,839. Arkansas Supreme Court. Term No. 82. Chapman & Dewey Lumber Company and Chapman & Dewey Land Company, plaintiffs in error, vs. The Board of Directors, St. Francis Levee District. Filed August 18th, 1911. File No. 22,839.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

CHAPMAN AND DEWEY LUMBER COMPANY AND CHAPMAN AND DEWEY LAND COMPANY, *Plaintiffs in Error,*
vs.
BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT, *Defendant in Error.*

No. 82.

In Error to the Supreme Court of the State of Arkansas.

Statement, Specification of Errors, and Brief for Plaintiffs in Error.

HENRY D. ASHLEY,
WILLIAM S. GILBERT,
For Plaintiffs in Error.

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No. 82.

In Error to the Supreme Court of the State of Arkansas.

Statement, Specification of Errors, and Brief for Plaintiff in Error.

STATEMENT.

On or about the 31st day of August, 1907, suit was commenced by Board of Directors St. Francis Levee District, defendant in error here and plaintiff below, who will hereafter be designated as Plaintiff, against the Chapman & Dewey Lumber Company, defendant below and plaintiff in error here, who will hereafter be designated as defendant, in the Circuit Court of Poinsett County, Arkansas, by the filing of a complaint which was and is in words and figures as follows:

"IN POINSETT CIRCUIT COURT.

Board of Directors of St. Francis Levee
Dsitrict, *Plaintiff*,
v.
Chapman & Dewey L'b'r. Co., *Defendant*.

Plaintiff states that the defendant is a corporation organized under the laws of the State of Missouri and engaged in the lumber business in the State of Arkansas.

That the defendant, beginning about the Fall of 1904, and continuing until the Summer of 1907, at various times entered upon the lands of the plaintiff, to-wit: Sections 14, 15, 22 and 23 in Township 12 N., R. 7 E., and cut therefrom 2,400 Cottonwood Trees, amounting in all to 4,696,800 feet.

Plaintiff states that the said timber was cut from these lands which were left unsurveyed by the United States Government but which would have been, if surveyed out, in the sections aforesaid.

Plaintiff states that it owns said lands by virtue of the Act of Congress of September 28th, 1850, granting all swamp and overflowed lands to the State of Arkansas, and by Act of the Legislature of the State of Arkansas of 1893 conveying to the plaintiff all of said lands.

Plaintiff states that said timber was worth the sum of Four Dollars ($4.00) per thousand, being in all the sum of $19,764.00.

Plaintiff states that the defendant entered upon said lands knowingly and willfully and without any just claim or right thereto, and without any probable cause on the part of the defendant to believe that the said lands so trespassed upon were its own.

Said plaintiff states that under the Statute of the State of Arkansas it is entitled to recover three times the value of said timber. Wherefore it prays judgment for the sum of $59,352.00 and for all costs and all other proper relief.

JEFF DAVIS,
H. F. ROLESON,
Attorneys for Plaintiff."

The answer to said complaint (in which answer the above named Chapman & Dewey Land Company joined as co-defendant) was filed on or about the 24th day of October, 1907, and thereafter the said cause was, by order of the said Circuit Court of Poinsett County, transferred to the Chancery Court of said Poinsett County, Arkansas, that being a court of equity.

Said answer filed in said cause showed a license from said Chapman & Dewey Land Company to said Chapman & Dewey

Lumber Company to cut timber on the land mentioned in the complaint and specially set up and claimed title in said Chapman & Dewey Land Company to said land from which timber was in said complaint alleged to have been cut, by showing that according to the official returns of the surveys made under authority of the United States, in Township Twelve (12) North, Range Seven (7) East, in Poinsett County, Arkansas, the place from which said timber was alleged to have been taken, was at the date of said surveys, not land, but, as alleged in said answer, "an open lake about two miles wide from east to west in the widest place and having an extreme length of about three miles from north to south." Upon the said surveys, as alleged in said answer, said lake was designated and marked "Right Hand Chute of Little River," "Sunk Lands;" defendant alleging ownership in said Chapman & Dewey Land Company of the surveyed and sectionalized lands as shown by said official surveys and the plat thereof, meandered on said lake so shown by said survey; and said answer specifically describing the surveyed and sectionalized tracts of land so owned by said Chapman & Dewey Land Company and alleging that all said tracts of land "were meandered upon the margin of said lake, the plats and field notes calling for the lake as a boundary, and the center of said lake and not the meander line aforesaid is the boundary thereof. The said lake has long been known as Bark Camp Lake."

Defendant further alleged in their said answer that since the date of said surveys the bed of said lake has been gradually raised by the annual deposit of sediment thereon and by other causes, and that much land has been thereby raised above the surface of the waters of said lake and that said Right Hand Chute of Little River and said lake are and always have been unnavigable waters.

And defendant specially set up, claimed and asserted in their said answer that "under and by virtue of the official record of said surveys, made under authority of the United States, by virtue of the laws of the United States, and especially the Act of Congress of September 28th, 1850, known as the Swamp Land Grant, and under and by virtue of the patents issued by the United States and a correct construction thereof, and the rulings of the Commissioner of the General Land Office of the United States and of the Secretary of the Interior with special reference to this land

and the adjudications of the Supreme Court of the United States, the defendant, Chapman & Dewey Land Company, was and is the owner of all of the bed of said 'Right Hand Chute of Little River' and 'Sunk Lands' within and towards the water from said meander lines thereof."

At the trial of said cause in said Chancery Court of Poinsett County, it was admitted in written stipulations filed therein, "That the State of Arkansas, not having previously alienated any of the lands hereinafter described, in 1871, by its patents or deeds, conveyed to Moses S. Beach all the following tracts of land situate in Poinsett County, Arkansas, to-wit: All of Sections One (1), Two (2), Three (3), Ten (10), Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Sixteen (16), Nineteen (19), Twenty-one (21), Twenty-two (22) and Twenty-three (23), all in Township Twelve (12) North, Range Seven (7) East" and it was further admitted in said stipulations "That all the right, title and interest so acquired by Moses S. Beach to all the land above described has become and is now vested in the Chapman & Dewey Land Company, without restriction, reservation or condition." The above named Sections 14, 15, 22 and 23 being the sections of which it was alleged in the complaint "that the said timber was cut from these lands which were left unsurveyed by the United States Government but which would have been, if surveyed out, in the sections aforesaid."

In support of the allegations contained in the answer, defendant introduced in evidence the duly certified copy of the official plat of the survey of said Township Twelve (12) North, Range Seven (7) East (see third plat bound in transcript at back) made under the direction of the General Land Office of the United States, together with certified copies of the official field notes of the several surveyors who made said survey, (see page 240 to 267 transcript) said plat showing, by the given acreages marked on the several subdivisions of land indicated thereon, that the total number of acres in said township was 14,329.97, which number of acres excluded all of said unsurveyed area marked "Right Hand Chute of Little River" and "Sunk Lands" as aforesaid; and the return of the Surveyor of Public Lands to the General Land Office expressly stated on the face of said plat that the sum of all the areas on said township plat was 14,329.97 acres as aforesaid. Defend-

ant also introduced a duly certified copy of the selection by the State of Arkansas of swamp land under the Act of Congress of September 28th, 1850, known as the Swamp Land Grant, (see p. 207-08 Transcript) which selection was approved by the Secretary of the Interior in 1853, and showed that the land selected and approved in said Township Twelve (12) North, Range Seven (7) East, comprised 13,815.67 acres, which computation of acreage corresponded exactly with the sum of all the areas as returned on said plat and above stated, after deducting therefrom School Section 16 (Sixteen) which could not be selected under said Swamp Land Grant and which computation of area excluded said Section Sixteen (16) and said unsurveyed area marked "Right Hand Chute of Little River" and "Sunk Lands."

Defendant also introduced in evidence the patent from the United States to the State of Arkansas, of date of September 27th, 1858, conveying by the following description, to-wit: "Township Twelve North, of Range Seven, East. The whole of the township (except section sixteen) containing thirteen thousand eight hundred and fifteen acres and sixty-seven hundredths of an acre, according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General;" which computation of area corresponded with the area of said township as returned upon said plat of survey after deducting said section sixteen, as aforesaid, and excluded said section sixteen and said unsurveyed area marked "Right Hand Chute of Little River" and "Sunk Lands."

And ~~plaintiff~~ defendant contended that by reason of said surveys made under authority of the United States and officially returned to and approved by the General Land Office of the United States and by reason of said selection by the State of Arkansas and said approval thereof by the Secretary of the Interior of the United States, and by reason of said patent, based on said survey, and under the laws of the United States contained in the several Acts of Congress affecting the matter in controversy, the State of Arkansas never selected as Swamp Land inuring to it under said Swamp Land Grant the unsurveyed area meandered and delineated as water by the official surveyors who surveyed said Township 12 North, Range 7 East, and by them designated "Right Hand Chute of Little River" and "Sunk Lands;" and that the United States

never patented said unsurveyed area to the State of Arkansas as Swamp Land, and that said State never acquired any title to said unsurveyed area other than its title to the same by virtue of riparian rights growing out of its ownership of the surveyed sectionalized and selected lands in said township conveyed to it as aforesaid by said patent from the United States; which riparian title passed to said Moses S. Beach by the State's patent of the shore land around said lake marked and shown as "Right Hand Chute of Little River" and "Sunk Lands," and thereafter became vested in Chapman & Dewey Land Company, as owner of the said shore lands, and that the said Plaintiff, the Board of Directors of the St. Francis Levee District, was and at all times had been without title to the same as donee of the State of Arkansas, and was therefore without cause of action against defendants or either of them.

On or about the day of October, 1910, said Chancery Court, after a trial of said cause, rendered a judgment and decree therein against defendants, Chapman & Dewey Lumber Company and Chapman & Dewey Land Company, for the sum of $2,801.16, from which judgment and decree defendants prosecuted an appeal to the Supreme Court of Arkansas and after a hearing in said cause, said Supreme Court on or about the fifth day of June, 1911, affirmed the judgment of said Chancery Court and entered final judgment and decree against your petitioners. And said judgment and decree of said Supreme Court was based upon an option of said Court filed in said cause wherein it was held, in substance, (see P. 218, Transcript) that because said meandered lake marked on the said official plat "Right Hand Chute of Little River" and "Sunk Lands" bore said designation "Sunk Lands" on said plat, it was not to be treated or construed as a lake but as land at the date of said survey and therefore, although not sectionalized and surveyed, it passed as swamp land under the selection, approval and patent of said township as a whole, from the United States to the State of Arkansas, and that under an Act of the Legislature of Arkansas in 1893, all of said unsurveyed area so marked "Right Hand Chute of Little River" and "Sunk Lands," passed to the Board of Directors of the St. Francis Levee District, notwithstanding that on said plat of survey and in said selection and approval and patent made in accordance with said plat, the quantity of said land stated to be contained in said township and surveyed, selected,

approved and patented, excluded all of said unsurveyed area marked and designated "Right Hand Chute of Little River" and "Sunk Lands" as aforesaid; and also notwithstanding that the State of Arkansas had, long prior to the year 1893, sold and conveyed to Moses S. Beach the several surveyed sections abutting on said unsurveyed area and made fractional by the meander line thereof; said Supreme Court holding further, in said opinion, that said Board of Directors of the St. Francis Levee District was, at the time of the alleged injury complained of, the owner of said unsurveyed area, notwithstanding the compromise and settlement between the United States and the State of Arkansas authorized, ratified and approved by the Acts of Congress hereinafter mentioned.

Said opinion is as follows:

KIRBY, J.:

This case is unlike that of *Little* v. *Williams,* 88 Ark., 37, and is not controlled by the decision therein as contended by appellant. There it was held that a grant of the township of land by a patent from the government by description "according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General, only conveyed the lands as surveyed and designated upon the plat, and did not convey lands under water shown upon the plat as 'lake.'" The court said:

"We do not mean to hold that the unsurveyed land could not have been selected as swamp lands and patented to the State by the use of the proper descriptive terms in the patent. But this was not accomplished by reference to townships, sections or parts thereof according to the plat of the surveys when the unsurveyed land did not appear upon the plats at all. The plats showed it to be water and not land."

In this case the Government plat of the township of land selected by the State as Swamp Lands, approved and patented as such lands in accordance with the map, and "according to the official plats of the survey of said lands returned to the General Land Office by the Surveyor General," shows the land in controversy marked "sunk lands."

It is contended that the meander line itself shows that the "sunk lands" was a body of water and we answer this in the language of the Supreme Court of the United States replying to a like contention:

"But, it is urged that the fact that a meander line was run amounts to a determination by the land department that the sur-

veyed fractional sections bordered upon a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in the face of the express declaration of the filed notes and plats that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forests or prairie, land or water, Government or Indian reservation." *Niles* v. *Cedar Point Club,* 175 U. S., 300; See also, *Keen* v. *Calumet Canal & Imp. Co.,* 190 U. S., 452.

At the time of the survey it was doubtless covered with water to a greater depth than the adjoining lands, increasing in depth as the bed of the stream was approached and undoubtedly not sectionized because of the water and the character of the land indicating its absolute unfitness for cultivation. The outside boundaries of the entire township are fixed, and the lands marked "sunk lands" upon the plat are within such outside fixed boundaries and shown to be so, and are clearly designated by reason of the meander line dividing the unsectionized sunk land from the surveyed and platted lands. The whole township having been selected by the State as swamp lands and the selection having been duly approved and the entire township patented to the State as swamp lands, with the exception of section 16, denominated "School Lands" which passed by another grant, and the unsurveyed lands shown by the plat to be land and not water, and in fact not being a lake but temporarily under water, and by the "remarks" and field notes of the Government surveyors who made the original surveys shown to be low, wet and unfit for cultivation, we hold that the entire township, except said section 16, passed to the State by the swamp land grants and terms of said patent, as swamp lands. This regardless of the fact that the quantity of land contained in the township was stated in the patent and accounted for in the lands laid off in sections and subdivisions, since quantity in cases of this kind is regarded merely a part of the description and rejected if it be inconsistent with the actual area when the same is indicated and ascertained by known monuments and boundaries. 3 Wash. Real Property, sec. 2322; 2 Devlin on Deeds, sec. 1044; *Doe* v. *Porter,* 3 Ark., 60; *Newson* v. *Pryor, Lessee,* 7 Wheat., 7; *Towell* v. *Etter,* 69 Ark., 34.

The unsurveyed, or the lands designated by the meander line and not laid off in sections and subdivisions thereof did not pass as contiguous to the surveyed lands by riparian right, but by being delineated on the map and included within the outside boundary lines of the township as fixed and designated by the Government. Said unsurveyed, or lands not sectionized, not being a lake or body

of unnavigable water, could not pass by riparian right of ownership with the lands bordering upon the meander line thereof, and did not pass to the State's grantee who purchased lands, sections and parts of sections, according to the map and plat of the Government which showed said lands so granted to be limited to the sections and subdivisions thereof as bounded by the meander line separating the said sunk lands from them. All the lands owned by the State were granted to the St. Francis Levee District in 1893 by act of the General Assembly, and this included and passed the State's title to all of these unsectionized sunk lands acquired by the State as swamp lands and designated as "sunk lands" on the Government plat thereof.

This grant to the Levee Board having been made prior to the State's settlement with the Government and relinquishment of its right to all the remaining swamp lands to which it may have had claim under the swamp land grant, was not affected by such settlement. It follows that the title to the whole township having passed to the State, that portion thereof not platted and designated as sections and parts of sections, not having been granted by the State to its purchasers under whom appellant claimed the right to take the timber therefrom, it still remained in the State and passed to and became the property of said district by said grant of 1893.

The District being the owner of the land had the right to maintain an action against appellant for taking the timber therefrom, and there being testimony sufficient to show that timber of the value of the amount found due and for which judgment was rendered was taken, the judgment will be affirmed.

Chief Justice McCulloch, dissenting.

Dissenting Opinion.

In the Supreme Court of Arkansas, July 10, 1911.

No. 101.

CHAPMAN & DEWEY LBR. CO.

v.

BOARD DIRECTORS, ST. FRANCIS LEVEE DIST.

MCCULLOCH, C. J.:

The facts of this case bring it, according to my views, within the rules of law announced in *Little* v. *Williams,* 88 Ark., 37, and I think that case should control. The court has, in attempting to distinguish the two cases, made a distinction without a substantial difference and, as much as I dislike to see decisions overruled which constitute rules of property, it seems to me it would have been infinitely better to overrule the former decision than to leave to law

in hopeless uncertainty by adopting a line of distinction which is too fragile to serve as a guide in the future.

The first point of distinction sought to be made is that in *Little* v. *Williams* the *locus in quo* had been designated on the plat of the public survey as a lake, and in the present case it was designated as "Sunk Lands." In each instance it was unsurveyed, as indicated by the plat and on the field notes. It is manifest that the surveyors in marking the words "Sunk Lands" meant to designate a body of water. A careful study of the field notes makes it plain that such was the intention and the history of those formations caused by the earthquake of 1811-12 confirms it. Lands which were sunken by that great convulsion of nature became, of course, covered by water and constituted lakes though sometimes designated by the other name to indicate the method of formation.

If the words of designation "Sunk Lands" meant a body of water it was the same as if marked lake, and falls squarely within the doctrine of *Little* v. *Williams*.

The distinction sought to be made as to the question of conveyance by township, is, I think, equally untenable. The only difference is that in *Little* v. *Williams* the unsurveyed *locus in quo* indented the outer boundaries of the township, while in the present case it runs through the township. The point of the decision in *Little* v. *Williams* was that a description by reference to the plat of a township conveyed only the surveyed land in the township. The views now expressed by the majority entirely disregard the effect of the former decision and, I think, necessarily overrules it.

No statement of oral evidence, (see p. 7 to 206 of transcript) is made.

First. Because it is all an attempt to show by present conditions long subsequent to surveys, which were made in 1840 and 1841, that a mistake was made in the surveys. Most of the witnesses testified in regard to timber cutting only, and of those who testified about present condition of *locus in quo* only one had known it for any length of time, and that witness Sage not earlier than 1874. This being a suit by the St. Francis Levee Board against Chapman & Dewey Lumber Company for cutting timber on area in Township 12, Range 7, marked "Right Hand Chute of Little River" and "Sunk Lands." No one but the Land Department of the United States can question the correctness of these surveys, and even if the plaintiff could have shown such mistake the only possible result would be to put the title to the land from which this timber was cut not in Plaintiff but in the United Staes.

Second. Because the opinion is based on the meaning of the words "Sunk Lands" on the official plat of Township 12 North, Range 7 East, the *locus in quo,* from which the timber is alleged

to have been cut, and upon the "whole Township theory," that is to say upon the theory that the whole of the area within the outside lines of such Township surveyed and unsurveyed, land and water, passed to the State of Arkansas by the Act of September 28th, 1850, and the Patent of the United States to the State of Arkansas, by following description, to-wit: "Township Twelve North, of Range Seven East. The whole of the Township (except section 16) containing thirteen thousand eight hundred and fifteen and sixty-seven hundredths of an acre, according to the official plats of survey of said lands returned to the General Land office by the Surveyor General," which computation of area corresponded with the area of said Township as returned upon such plat and survey after deducting said Section Sixteen (16) as aforesaid; and excluded said Section Sixteen (16) and said unsurveyed area marked "Right Hand Chute of Little River" and "Sunk Lands."

SPECIFICATION AND ASSIGNMENT OF ERRORS.

First. Said Supreme Court of Arkansas erred in entering judgment affirming the judgment and decree of the Chancery Court of Poinsett County, Arkansas, against the plaintiffs in error, defendants in said Chancery Court.

Second. Said Supreme Court erred in not reversing the said judgment and decree of the Chancery Court of Poinsett County, Arkansas, aforesaid.

Third. Said Supreme Court erred in holding that the unsurveyed area on which timber was alleged in the complaint to have been cut, belonged at the time of said alleged cutting to the defendant in error, Board of Directors St. Francis Levee District, and not to the plaintiff in error, Chapman & Dewey Land Company, nor to the United States.

Fourth. Said Supreme Court erred in holding that the unsurveyed area aforesaid was not, at the time of said alleged cutting of timber thereon, the property of the plaintiffs in error Chapman and Dewey Land Company.

Fifth. Said Supreme Court erred in holding that said unsurveyed area was selected by the State of Arkansas as swamp land inuring to it under the Act of Congress of September 28,

1850, known as the Swamp Land Grant, and was patented to the State of Arkansas by the United States as swamp land inuring to said State under said Act of Congress; and in holding that it, therefore, never belonged to the State of Arkansas nor to the plaintiff in error Chapman & Dewey Land Company, as riparian owner thereof.

Sixth. Said court erred in holding that the words "sunk lands" were intended to indicate or did indicate land and not water, such term having universally been used on plats of townships within the territory affected by the New Madrid Earthquake as synonymous with the word lake, same frequently appearing on plats of townships in that region as "Sunk Lands or Lake."

Seventh. Said Supreme Court erred in so construing the official plat of the survey of Township Twelve (12) North, Range Seven (7) East, in Poinsett County, Arkansas, made under the authority of the United States, and duly and officially returned to the General Land Office, as to hold that the unsurveyed area from which said timber was alleged to have been cut, is shown on the face of said official plat to have been land at the date of said survey and not a permanent body of water or lake; and that said unsurveyed area was not, on said plat, excluded from, but was included in the land areas marked and shown on said plat.

Eighth. Said Supreme Court erred in holding that the patent from the United States to the State of Arkansas of date of September 27, 1858, conveying the land described by the following description, to-wit: "Township Twelve, North, of Range Seven, East. The whole of the township except Section 16; containing 13,815 67/00 acres, according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General," did not exclude, but included, described, and conveyed to said State, as land in place, and not by riparian right, all of that unsurveyed area shown and meandered as water on said plat of survey, notwithstanding said unsurveyed area is, on the face of said plat, excluded from all land areas thereon.

Ninth. Said Supreme Court erred in not holding that by virtue of the said official survey made and returned as aforesaid under the authority of the United States, and upon a proper construction of the official plat thereof, and of the selection thereunder

by the State of Arkansas, and the approval thereof, and of said patent of September 27, 1858, from the United States to the State of Arkansas describing the land granted and conveyed according to said official plat of survey, the title to the unsurveyed area shown and meandered on said official plat as water and designated "Right Hand Chute of Little River" and "Sunk Lands" on said plat, passed to the State of Arkansas as riparian owner, and therefor in not holding that, by *mesne* conveyance from said State, of the fractional sections abutting on said water so shown, the plaintiff in error, Chapman & Dewey Land Company, by operation of the law of riparian rights, was the owner, at the date of the alleged cutting of said timber, of the unsurveyed area mentioned in said complaint on which said timber was therein alleged to have been cut.

Tenth. Said Supreme Court erred in this: that, after finding from an erroneous construction of said official plat of United States Government survey, that said unsurveyed area was land in place and not (as shown thereon) a body of water or lake at the date of said survey, it nevertheless held the title to said unsurveyed area to be, not in the United States, but in the Board of Directors of the St. Francis Levee District as donee of the State of Arkansas; such holding (based on such finding) being repugnant to and in conflict with the Act of Congress of April 29, 1898, ratifying the compromise and settlement of February 23, 1895, between the United States and the State of Arkansas, whereby the said State released and quit claimed to the United States all claims adjusted and unadjusted, growing out of the swamp land grant of 1850, as evidenced by an Act of the General Assembly of said State of March 10, 1897, with relation thereto; and such holding of said Supreme Court being in conflict with and repugnant to said compromise and settlement duly entered into through the duly authorized officers of the United States and the State of Arkansas under an Act of the General Assembly of said State of April 8th, 1889, and under an Act of Congress of August 4th, 1894, entitled "An act to authorize a compromise and settlement with the State of Arkansas;" by the terms of which said compromise and settlement of February 23, 1895, the State of Arkansas expressly relinquished to the United States all claim to land not therefore patented, approved or confirmed by the United States to said State under the swamp land grants of the United States.

FEDERAL QUESTIONS.

1. Whether upon a proper construction of said surveys made under authority of the Uuited States and of the official plats and field notes thereof returned to and approved by the General Land Office of the United States, and of said selection by the State of Arkansas and the approval thereof, and of said patent from the United States, and of the laws of the United States, especially the Act of Congress of September 28th, 1850, known as the Swamp Land Grant, and the Act of Congress of August 4th, 1894, entitled "An Act to Authorize a Compromise and Settlement with the State of Arkansas." and of the compromise and settlement dated February 23rd, 1895, made under authority of said last named Act and duly reported to the Congress of the United States, whereby the said State relinquished and quit claimed to the United States all claims or demands adjusted or unadjusted growing out of the said Act of September 28th, 1850, known as the Swamp Land Grant, and relinquished its claim to all land not theretofore patented, approved or confirmed to the State under the Swamp Land Grant, and of the Act of Congress of April 29th, 1898, ratifying said compromise and settlement, and of the public and official decisions of the Secretary of the Interior construing said official returns of survey, selections and approval, patent, Acts of Congress, and said compromise and settlement, with special reference to the land involved in this controversy the said Board of Directors of the St. Francis Levee District as donee of the State of Arkansas under an Act of the Legislature of that State in the year 1893 ever acquired, as stated in its complaint hereinbefore set out any title to the land from which the timber mentioned in said complaint is therein alleged to have been taken.

2. Whether under said surveys and the official returns thereof, said selection, approval, patent, Acts of Congress, compromise and settlement and rulings of the Secretary of the Interior, the title to said land was not at the time of the alleged injury complained of in this case vested in your petitioners, Chapman & Dewey Land Company, by the operation of the law of riparian ownership.

3. Whether under said surveys and the official returns thereof, said selection, approval, patent, Acts of Congress, compromise and settlement and rulings of the Secretary of the Interior, the

title to said land was at the time last aforesaid in the United States, and whether, therefore, said sum of $2801.16 thus adjudged and decided in favor of the Board of Directors of the St. Francis Levee District, if in equity and justice owing by said Chapman &. Dewey Lumber Company to anyone for timber cut from said unsurveyed area, is not in equity and justice owing to the United States.

4. Does the swamp land patent of whole Township 12 North, Range 7 East, (see page 209 of Transcript) according to Government plats within whose outside boundaries are unsurveyed areas making fractional certain sections meandered on such areas and marked on plat "Right Hand Chute of Little River" and "Sunk Lands" and referring to such Government plats and giving a computation of areas equal to the surveyed sections and fractional sections and excluding from such computations Section 16 and such unsurveyed area, operate to convey as swamp lands to the State of Arkansas the entire area within the exterior township lines, surveyed and unsurveyed, wet or dry, land or water?

5. What is the proper construction to be given to the words "Right Hand Chute of Little River" "Sunk Lands" as appearing on the Government plat of Township 12 North, Range 7 East? Do such words indicate land or water?

BRIEF AND ARGUMENT ON FEDERAL QUESTION.

Whenever the question in any court, State or Federal, is whether the title to land which has once been the property of the United States has passed from the Federal Government, that question must be resolved by the laws of the United States.

Wilcox v. *Jackson*, 13 Pet. 498, 517;
Irvine v. *Marshall*, 20 Howard 558;
Gibson v. *Choteau*, 13 Wall. 92.

Congress alone has, under Art. IV, Sec. 3, of the Constitution, the power to determine the manner of disposing of the public lands, and it has the sole power to declare the dignity and effect of titles emanating from the United States.

United States v. *Gratiot*, 14 Peters, 562;
Bognel v. *Broderick*, 13 Peters, 436;

Downes v. *Bidwell*, 182 U. S. 268;
Kean v. *Calumet Canal & Imp. Co.*, 190 U. S. 466.
Heath v. *Wallace*, 138 U. S. 584.

The decision of the Supreme Court of Arkansas that the entire area of Township 12, Range 7 North, Poinsett County, Arkansas, surveyed and unsurveyed, passed as swamp land to the State of Arkansas by United States Swamp Land Patent (See p. 209 Transcript) is contrary to the right, title, privilege or *immunity* specially set up and claimed by plaintiff in error under a treaty, statute, commission or authority of the United States in this, that the Compromise Agreement of 1898 between the United States and the State of Arkansas leaves the title to these unsurveyed and unpatented lands in the United States and the Land Department in 1908 so decided.

See 30 Stat. at Large U. S. 367;
Vol. 37 L. D. 345;
Vol. 37 L. D. 462.
Gazzam v. *Phillips*, 20 How. 372;
Horne v. *Smith*, 159 U. S., 4;
Niles v. *Cedar Point Club*, 175 U. S. 300.

Plaintiff in error being defendant below, and the opinion of the Supreme Court of Arkansas (See Transcript p. 222) being based on the interpretation of United States Government Plats and "Whole Township Theory," the dismissal of writ of error by this court in case *Chapman & Dewey Land Company* v. *Bigelow*, 206 U. S., 41, has no bearing on the instant case.

It having been decreed by the chancellor that the plaintiff, Board of Directors of St. Francis Levee District, do have and recover of defendants, Chapman & Dewey Lumber Company and Chapman & Dewey Land Company, the sum of $2801.16 and costs, and that decree having been by the Supreme Court of Arkansas in all things affirmed, the federal question in this case is at once apparent, because there is only one possible ground on which defendants could be liable to the plaintiff for cutting this timber and that is on the ground that the Levee Board was and is the owner of the unsurveyed and unpatented *locus in quo* meandered as water and designated on the United States Government plats as "Right Hand

Chute of Little River" "Sunk Lands." The only theory on which the Levee Board could be held to be such owner is the "Whole township theory." That theory as stated in the opinion of the Supreme Court of Arkansas is, that because said meandered lake marked on said official plat, "Right Hand Chute of Little River" "Sunk Lands" bore said designation "Sunk Lands" on said plat, it was not to be treated or construed as a lake but as land at the date of said survey and therefore, although not sectionized and surveyed, it passed as swamp lands under act of September 28, 1850, and selection, approval and patent of said township as a whole, from the United States to the State of Arkansas, and that under an act of the Legislature of Arkansas, of 1893, known as the donation act, all said unsurveyed area passed to the defendant Levee Board. This whole township theory is evidently by its mere statement against the title, right, privilege, and immunity specially set up and claimed by the plaintiff in error under a statute and commission held and authority exercised under the United States. It is entirely contrary to the whole system of public surveys and patents and contrary to the rulings of the Land Department of the United States in its administration of the public lands. The rulings of the Land Department of the United States have been without consistency so far as the rights of riparian claimants are concerned, it having been decided by Secretary Hitchcock in November, 1904, in favor of the riparian claimant and by Assistant Secretary Pierce under Secretary Garfield in 1908, against the riparian claimant in favor of the United States. It has never been held by the Land Department of the United States, however, that anything could pass under United States Government patent except surveyed areas where the patent as in this case referred to the plat; the plats in such cases becoming as much a part of the patent as though written out in full in the patent. *Cragin* v. *Powell*, 128 U. S. 691, and such plats and surveys are not open to collateral attack.

Stoneroad v. *Stoneroad*, 158 U. S. 240;
Russell v. *Maxwell Land Grant Co.*, 158 U. S. 253;
Horne v. *Smith*, 159 U. S. 40.

Nor does the fact that the Supreme Court of Arkansas might have decided this case on some other theory, defeat the jurisdiction of this Court on writ of error, for as decided by this Court, speaking by the Chief Justice in June of this year, where the case was de-

cided on a federal question, the fact that it might have been decided from a non-federal point of view does not afford a basis for holding that it was decided on the latter ground and that this Court has no jurisdiction under Section 709, Revised Statutes.

See *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S. 265. Also *Wadkins* v. *Producers' Oil Co.*, 227 U. S. 368.

In the Wilcox case, cited *supra*, Mr. Justice Barbour in the opinion uses the following language: "A much stronger ground however, has been taken in argument. It has been said that the State of Illinois has a right to declare by law that a title derived from the United States, which by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States, and the construction of her own Courts seems to give that effect to her statute. That state has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise or alienation. But the property in question was a part of the public domain of the United States. Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued, and therefore by the Laws of the United States the legal title has not passed, but remains in the United States. Now, if it were competent for a state legislature to say that notwithstanding this, the title shall be deemed to have passed, the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the Constitution to Congress only. And the pratical result in this very case would be, by force of State legislation, to take from the United States their own land, against their own will, and against their own laws. We hold the true principle to be this that whenever the question in any Court, State or Federal, is, whether a title to land which had once been the property of the United States *has passed*, that question must be resolved by the Laws of the United States; but that whenever, according to those

laws, the title shall have passed, then that property like all other property in the state, is subject to state legislation so far as that legislation is consistent with the admission that the title passed and vested according to the Laws of the United States."

BRIEF AND ARGUMENT ON THE MERITS.

Decree in favor of plaintiff for $2801.16 and costs must be reversed and judgment rendered in favor of defendant (plaintiff in error) for costs unless on some principle of law plaintiff, St. Francis Levee Board, can be held to have been the owner of unsurveyed *locus in quo* at the time the timber was cut therefrom.

The whole Township Theory is the only one which would put the title in the plaintiff Levee Board. This theory is against numerous decisions of this Court and against the rulings of the Land Department of the United States and the entire system for the survey and disposition of the public lands.

37 L. D. 345;
37 L. D. 462;
Cragin v. *Powell*, 128 U. S. 691;
Little v. *Williams*, 88 Ark., 37.
Gazzam v. *Phillips*, 20 Howard, 372.

TITLE OF RIPARIAN OWNERS.

When in the extension of lines of public surveys a lake is meandered, its area is segregated from the public domain and beds of island non-navigable meandered lakes or lands uncovered by the recession of the waters of such lakes from natural or artificial causes, since the survey and disposition of the adjacent shore lands, do not belong to the United States but to the riparian owners.

Hardin v. *Jordan*, 140 U. S. 371;
Mitchell v. *Smale*, 140 U. S. 406;
Kean v. *Calumet Club*, 190 U. S. 466;
Whittaker v. *McBride*, 197 U. S. 510;
Harrison v. *Fite*, 148 Fed., 781.

The doctrine above announced, is the *Lex Naturae* and Common Law applied to grants by the United States of public lands

bounded and meandered on island streams, lakes and ponds, without reservation or restriction of terms and such grants are to be construed, as to their effect, according to the laws of the State where the land lies.

Hardin v. *Jordan, supra;*
Grand Rapids & I. R. Co. v. *Butler,* 159 U. S. 87.

The Common Law doctrine of riparian rights is fully recognized in Arkansas.

Harrison v. *Fite,* 148 Fed. 781;
Warren v. *Chambers,* 25 Ark., 120;
Rhodes v. *Cissell,* 82 Ark. 367;
Little v. *Williams,* 88 Ark., 37.

If this Court shall resolve the question of jurisdiction in favor of plaintiff in error, it seems to us, that the decree of the Supreme Court of the State of Arkansas must be set aside. This the Court may do either, first, because the title is in the United States; second, because the title is in the Chapman & Dewey Land Company, as admitted owner of the fractional sections surrounding and meandered on the *locus in quo,* or, third, because the title on no theory can be in the Levee Board plaintiff, and therefore, the decree must be reversed because the Levee Board having no title whatever to the land from which the timber was cut, can not recover for the cutting of the timber as alleged in the complaint in this case. Moreover, if this decree is permitted to stand by the dismissal of this writ of error, Chapman & Dewey Land Company must pay the Levee Board $2801.16 for cutting this timber and such satisfied judgment would be no bar to a suit by the United States for cutting this same timber.

In the consideration of the merits of this case we are confronted with two decisions of the Supreme Court of Arkansas diametrically opposed to one another, namely, *Little* v. *Williams,* number 8 on the Term Docket of this Court, and which has been submitted and is now under advisement and reported in the 88 Arkansas, page 37, and the instant case which is reported in Volume 100 Arkansas at page 94.

To show how diametrically opposed to each other these two cases are we quote in parallel columns from the opinion of the Court in the two cases.

LITTLE V. WILLIAMS.

"Description of lands according to terminology employed in the system of governmental surveys and plats of lands is necessarily a reference to the plats of those sruveys; for those terms are meaningless unless so considered with reference to the surveys and plats. There is nothing known of townships, sections, and parts of sections of lands, except such as are described in the plats of the Government surveys. Therefore, giving the word 'township' used in the stipulation of facts the meaning which we must attribute to the parties who employed the term, it has reference to the townships surveyed and platted by the Government surveyors, and means townships according to the surveys and plats. A conveyance of the township 'according to plat of the surveys' does not include lands which do not appear on the plat of the surveys. We do not mean to hold that the unsurveyed lands could not have been selected as swamp lands and patented to the State by the use of proper descriptive terms in the patent; but this was not accomplished by reference to townships, sections, or parts thereof, according to the plat of the surveys, when the unsurveyed land did not appear on the plats at all. The plats showed it to be water and not land."

CHAPMAN & DEWEY LUMBER COMPANY V. LEVEE DISTRICT.

INSTANT CASE.

"The whole township having been selected by the State as swamp lands and the selection having been duly approved, and the entire township patented to the State as swamp lands, with the exception of section 16, denominated 'school lands' which passed by another grant, and the unsurveyed lands shown by the plat to be land and not water, and in fact not being a lake but temporarily under water, and by the 'remarks' and field notes of the Government surveyors, who made the original surveys, shown to be low, wet and unfit for cultivation, we hold that the entire township, except section 16, passed to the State by these swamp land grants and terms of said patent as swamp lands. This regardless of the fact that the quantity of land contained in the township was stated in the patent and accounted for in the lands laid off in sections and subdivisions, since quantity in cases of this kind is regarded merely as part of the description, and is rejected if it be inconsistent with the actual area, when the same is indicated and ascertained by known monuments and boundaries."

We know of no case in any Court of the United States, Federal or State, notwithstanding the vast number that have been decided, that has announced the whole township theory as above set out in the instant case, save only the case of *McDade* v. *Levee District*, 109 La., page 22, unless it be *People* v. *Warner*, 116 Michigan, 228.

Remaining questions on the merits are, is the title still in the United States, or is the title to the *locus in quo* in plaintiff in error,

Chapman & Dewey Land Company, by reason of its admitted riparian ownership in the fractional sections meandered on and surrounding the *locus in quo?*

So far as the Land Department of the United States has power to pass on this question it also has rendered diametrically opposed decisions. Beginning almost as soon as the leading case for the riparian owners, *Hardin* v. *Jordan,* 140 U. S., 371, was decided, May 11, 1892, the Department began rendering opinions, and on application of the St. Francis Levee Board for a survey of lands including the very lands in the instant case, Mr. Secretary Hitchcock, on Nov. 17th, 1902, in an opinion, the original of which had the approval of Mr. Justice Van De Vanter, then Assistant Attorney General for the Land Department, said "When in the extension of the lines of public surveys a lake is meandered, its area is segregated from the public domain and beds of inland non-navigable mea ed lakes or lands uncovered by the recession of the waters of such lakes from natural or artificial causes, since the survey and disposition of the adjacent shore lands, do not belong to the United States but to the riparian owners." For this opinion in full see transcript, p. 111, in case No. 262, *C. & D. L. Co.* v. *Bigelow,* decided in this Court May 13, 1907. From decision of *Hardin* v. *Jordan,* May 11, 1892, down to the 12th of December, 1908, no successful effort was ever made to attack the integrity of the surveys affecting the Arkansas "Sunk Lands," and not until sixty-eight years after those surveys were made was the uniform ruling of the Land Department above referred to departed from. Mr. Assistant Secretary Pierce, under Secretary Garfield, then first said:

"The disposition of the public domain lies within the exclusive jurisdiction of Congress who alone has power to declare how the United States may be divested of its title. From this it follows that unless title has passed out of the United States by reason of the operation of some law of Congress, or by the authorized act of some official done in accordance with the directions of some act of Congress, it still remains in the Government and no mere declaration or expresion of opinion by any executive officer of any of the departments could operate to divest such title."

While we believe the Courts have generally held the doctrine of estoppel as not applicable to the United States, we certainly think that where private rights have accrued and parties have changed

their condition on the faith of the ruling of the Land Department, there should be some consistent continuity to such rulings. Mr. Justice Brown in *Noble* v. *Union Logging Company,* 147 U. S., loc. cit., page 176, says:

"A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law and was therefore void." And quotes with approval language of Mr. Justice Grier in *United States* v. *Stone,* 2 Wall., 525, 535, as follows:

"One officer of the Land Office is not competent to cancel or annul the act of his predecessor, that is a judicial act, and requires the judgment of a Court."

See also application for survey of G. L. Burns, 23 L. D., 430;
Ex Parte Michael Denody, 11 L. D. 504;
U. S. v. *Bank of Metropolis,* 15 Peters, 377;
Stone v. *U. S.,* 2 Wall., 525.

This timber was cut from the land in question from the fall of 1904 to September, 1907. (See page 2, of Transcript) on the faith of the opinion of Mr. Secretary Hitchcock, dated December 17, 1902, and before the opinion of First Assistant Secretary Pierce rendered December 12, 1908. Oral testimony, such as will be found in this transcript from page 7 to page 207, taken sixty-eight years after the survey in regard to conditions produced by the New Madrid Earthquake in 1811, which created these "Sunk Lands," is not either competent enough nor relevant enough, nor has it sufficient probative force to affect the candid mind of any disinterested judge or even layman as to conditions in 1840 and 1841 when these surveys were made. Pioneers who purchased timber lands in the wild region known as the Arkansas "Sunk Lands" were compelled to purchase on the faith of the United States Government plats. The State patents to Beach (see Transcript, page 221) were dated in 1871.

Mr. Assistant Secretary Pierce, in his letter of February 27, 1909, (see Volume 37 L. D., bottom of page 466, top of page 467), referred to by the Solicitor General of the United States in his suggestions filed in this Court, October 27, 1913, says, "It is not believed that there is any such thing as estoppel against the United States in the absence of express statutory provisions to that effect.

Nor does it appear from the circumstances of this case that any action has been taken by the Government through any of its officers which should operate as an equitable estoppel. Had the riparian claimants purchased fractional tracts soon after the surveys were made, believing that they actually bordered on the water, and without knowledge of the fact that they did not so border on the water but were separated therefrom by no inconsiderable extent of land, they might in that event assert with some reason that they had acquired thereby equitable rights which should not now be disturbed. But such is not the case. The purchase was made comparatively recently with full knowledge of the existing conditions." The record does not disclose when the Chapman & Dewey Land Company received its conveyance from Beach. This conveyance is covered by stipulation. See page 210 of transcript as follows: "2nd. That all the right, title and interest so acquired by Moses S. Beach to all the land above described, has become, and is now vested in the Chapman & Dewey Land Company, without restriction, reservation or condition. Plaintiff in error claims in privity with and as grantees of Beach.

RIPARIAN RIGHTS.

Riparian rights are based upon the common law and are older than this Government, are part of *Lex Naturae,* have no dependence on plats or surveys, and are important legal incidents to grants. If the system of the United States Government surveys had never been adopted and this whole region of the Arkansas "Sunk Lands" were unsurveyed and the existing governmental authority issued a patent or deed describing by metes and bounds, the area surrounding the *locus in quo* marked "Right Hand Chute of Little River" "Sunk Lands," the patent or conveyance would carry the bottom of non-navigable lake or pond if the description by metes and bounds meandered around its border. This both by the common law and by the provisions of section 2476, United States Compiled Statutes of 1901, which has been on the Federal Statute books since 1796 and which was alluded to as affecting this long standing Controversy in the Supreme Court of the United States by the Chief Justice in his dissenting opinion in *Kean* v. *Calumet Canal Company,* 190 U. S. loc. cit., page 480, and again cited by Mr.

Justice Van De Vanter in the recent case, *Scott* v. *Lattig,* 227 U. S., loc. cit., page 229.

Nothing but surveyed area can pass as swamp land because the entire vesting of title has its origin in the act of Congress of September 28, 1850, which, though in the earlier cases described as a grant ***in presenti,*** calls for surveys and selections and patents, and it has been repeatedly held that nothing but a patent will vest the legal title, and these swamp land patents always containing the language "according to Government plats and surveys," such plats and surveys have universally been held as much a part of the patents as though written therein in full.

The mistake in the surveys which prevented the doctrine of *Hardin* v. *Jordan* and cases following from being applied in cases of *Horne* v. *Smith,* 159 U. S. p. 40, and *Niles* v. *Cedar Point Club,* 175 U. S., p. 300, would equally apply to mistake in a metes and bounds description which was based on a private survey or on no survey at all, but called for ancient monuments, such as trees, and so forth, and failed in its courses and distances to go to the water covered area for which the description called.

The question whether areas outside meander lines as marked on Government plats passed as swamp lands under act of September 28, 1850, and surveys, selections, and patents made in pursuance thereof is a pure question of the construction of the Federal Statutes, but the question of whether non-navigable lakes and ponds have passed by riparian right as an incident to a conveyance of bordering lands meandered in any method on such lakes and ponds is a question of common law. It is respectfully suggested that failure to keep this distinction in mind may explain some of the difficulties experienced by a lawyer in following this Court through the mazes of the conflicting case such as *Hardin* v. *Jordan* and cases following, and *Horne* v. *Smith, Niles* v. *Cedar Point* and cases following, and which led to the long dissenting opinion of the Chief Justice, in the case of *Kean* v. *Calumet Club,* 190 U. S., 452.

Respectfully submitted,

HENRY D. ASHLEY,
WILLIAM S. GILBERT,
For Plaintiffs in Error.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

No. 82.

CHAPMAN & DEWEY LUMBER COMPANY,
CHAPMAN & DEWEY LAND COMPANY,
Plaintiffs in Error,

vs.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT,
Defendant in Error.

Brief and Argument for Defendant in Error.

SAMUEL ADAMS,
H. F. ROLESON,
J. C. HAWTHORNE,
N. F. LAMB,
ATTORNEYS FOR DEFENDANT IN ERROR.

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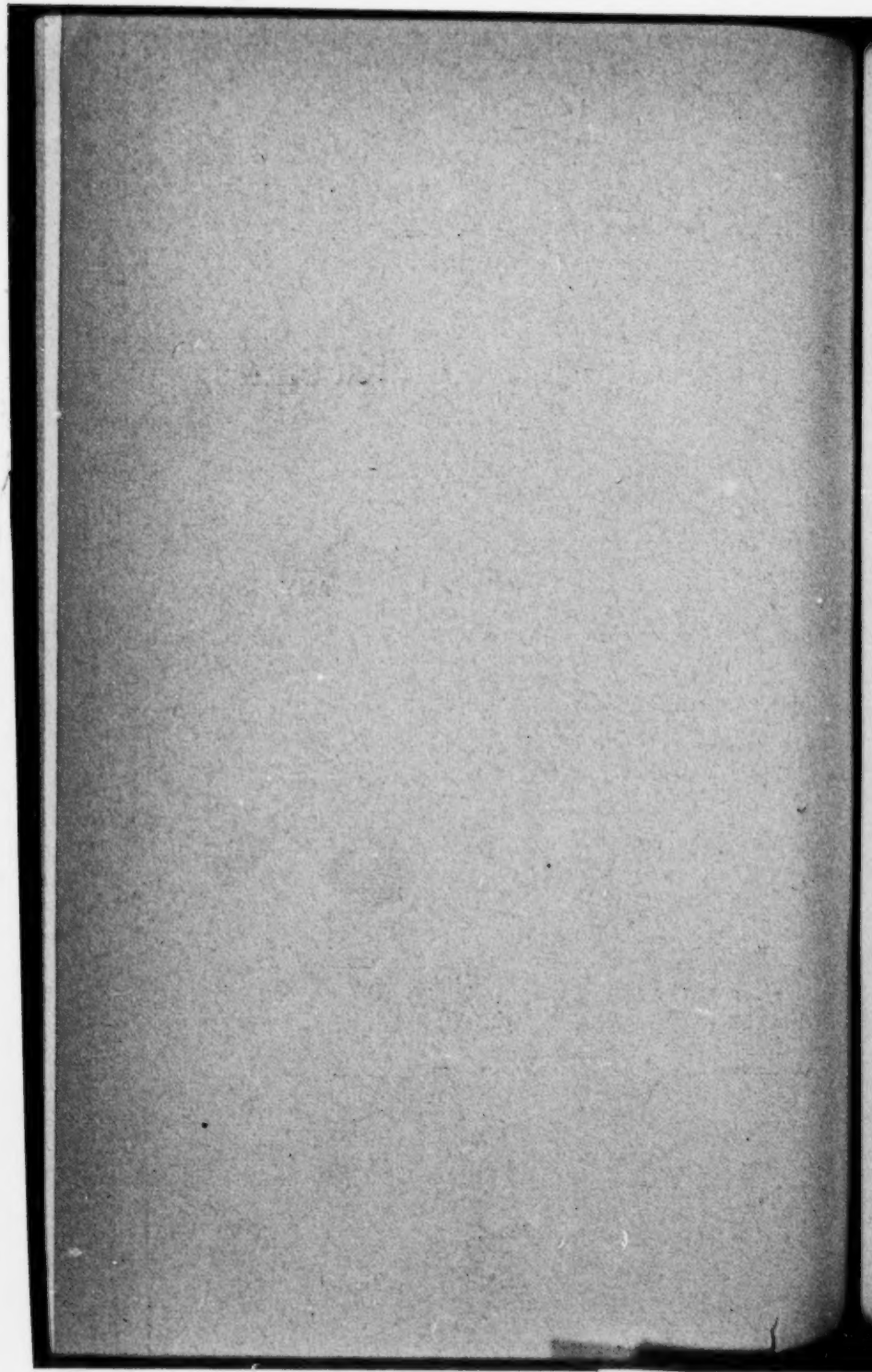

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No. 82.

CHAPMAN & DEWEY LUMBER COMPANY,
CHAPMAN & DEWEY LAND COMPANY,
Plaintiffs in Error,

vs.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT,
Defendant in Error.

Brief and Argument for Defendant in Error.

STATEMENT OF FACTS.

The facts in the case, briefly stated, are as follows:

Plaintiffs in error cut timber from certain lands in Township 12 North, Range 7 East, Fifth Principal Meridian, in Poinsett County, Arkansas. The Levee District, claiming to be the owner of said lands, sued plaintiffs in error for the value of the timber cut. Under Arkansas practice the suit was transferred to the equity side of the court, there heard, and a decree was entered in favor of the Levee District. On appeal this decree was affirmed

by the Supreme Court of Arkansas, one justice dissenting. A petition for rehearing was denied and a writ of error sued out from this court.

The *locus in quo* was part of what are popularly known as "sunk lands" in northeastern Arkansas. It seems that in the years 1811 and 1812 the New Madrid earthquake, or series of earthquakes, caused a subsidence of a very considerable area of land in northeastern Arkansas to such an extent that land which was theretofore dry land or at most subject to occasional overflow became swampy and subject to periodical overflow from the Mississippi River. Much of this land, including the land in question, was surveyed in the forties and the surveyors, apparently encountering much difficulty from the swampy condition of the land, meandered out large portions of country, designating many of these meandered out portions as "sunk lands," or as "sunk lands, swamp and overflowed." The township lines and corners were established and the parts of the township not so meandered out and not appearing to be parts of lakes or rivers were divided into sections in the ordinary manner. Matters were in this situation when Congress passed the Swamp and Overflowed Land Act of September 28, 1850, by which Congress granted to the State of Arkansas and other states all swamp and overflowed lands not otherwise disposed of within their respective borders. As all the lands in this entire section of Arkansas came evidently under the description of swamp and overflowed lands, (except perhaps for an occasional partly navigable body of water) the government having no longer any beneficial interest, very nat-

urally made no further surveys. In fact, nothing remained to the government but the duty of issuing patents in accordance with the terms of that act.

The lists of lands made out as selection lists under the Swamp and Overflowed Land Act were made out as whole townships and were in large part approved as whole townships by the Secretary of the Interior. The township in question was so listed and approved when the act of March 3, 1857, was passed confirming title in several states to the lands selected as swamp and overflowed.

Subsequently, under the act of September 28, 1850, a patent was issued from the United States government to the State of Arkansas covering, among other lands, "the whole of" Township 12 North, Range 7 East. At various times the State of Arkansas sold off portions of its swamp and overflowed lands, the sales, however, being apparently restricted to the sectionized area outside the meander lines, for the reason doubtless that there was no authority in the state officers to sell any land except by the acre. The Chapman & Dewey Land Company, through purchase from Arkansas in 1871, and mesne conveyances, became the owners of the sectionized lands surrounding the *locus in quo*, which is part of a large area denominated sunk lands in said Township 12 North, Range 7 East. In 1893 the State of Arkansas formed by legislative act the St. Francis Levee District, a quasi municipal corporation, created for the purpose of building levees, and reclaiming the lands in a large territory in Northeastern Arkansas, including, among a great deal of other land, all of Township 12 North, Range 7 East.

The Levee District was given taxing powers. By a subsequent act, also of 1893, the legislature of Arkansas granted to the Levee District all the lands of the state (except sixteenth sections) within the limits of the district, and provided for the sale of these lands in order to enable the district to raise additional funds for the construction of levees. (Acts of Arkansas, 1893, pp. 172-4.) The district thereafter constructed a levee to keep out the waters of the Mississippi River, which levee was completed in 1897. (See answer of defendants below, printed transcript, p. 7.) In 1898 there having been a number of matters in dispute between the State of Arkansas and the United States government, an agreement of compromise was made, ratified and made effective by the act of Congress of April 29, 1898 (30 Statutes at Large, 367), whereby the State of Arkansas relinquished to the United States all claims under the Swamp and Overflowed Land Act of September 28, 1850, except, among others, to the lands patented, approved or confirmed to the State of Arkansas under the act of September 28, 1850 (9 Statutes at Large, 520), the act of March 2, 1855 (10 Statutes at Large, 634), and the act of March 3, 1857. (11 Statutes at Large, 251.) The material parts of the original agreement of compromise are printed as an appendix to this brief.

By this decree the chancellor found that the lands described from which the timber was cut were shown upon the map and plat to be in Township 12 North, Range 7 East, and as "sunk lands"; that they were in fact land at the time of the original survey by the United States government and at the time of the se-

lection of the township by the governor of the State of Arkansas and at the time of the approval of such selection by the Department of the Interior; that the survey established all the corners of said township and all the exterior lines; tnat in fact Township 12 North, Range 7 East, was surveyed; that the selection by the governor of the State of Arkansas and the approval thereof by the Department (of the Interior) and the patent issued thereunder carried the title to all lands within said township; that the State of Arkansas by legislative act conveyed said lands to the St. Francis Levee District; and that the plaintiffs below were entitled to recover $2,801.16 for the value of the timber cut by the defendants below.

Counsel's statement of fact on page 5 of their brief says that the land selected in Township 12 North, Range 7 East, comprised 13,815.67 acres, which acreage they state corresponds exactly with the sum of the acreages (except Section Sixteen) shown on the plat which they had used in evidence. Counsel seem to be mistaken in this. The gross sum of the areas of the separate pieces above the meander line shown by the plat appears to be 14,549.72 acres. If, following the Land Office's practice (see Printed Transcript, p. 207) we subtract the acreage shown for Section Sixteen, we still get 14,035.42 acres, but the plat gives no figures either for the E. ½ of N. E. ¼ of Section 28 or that part of the S. E. ¼ of Section 30, south of the "Little River." These two together from their size on the plat appear to contain at least 120 acres. It follows that the acreage stated in the approved list and in the

patent was over 300 acres short of the acreage appearing from the plat.

The contention of the defendants below, plaintiffs in error here, as we understand it, is two-fold. First, that by a proper construction of the approved lists and the patent covering Township 12 North, Range 7 East, the land in dispute shown by the government survey to be sunk lands within the exterior boundaries of the township did not pass to the State of Arkansas except as appurtenant to the sectionized lands in said township and that as appurtenant to such sectionized lands the title to the land in question passed to the defendant, Chapman & Dewey Land Company, through mesne conveyances from the State of Arkansas.

Second, that if the land was not the property of Chapman & Dewey Land Company, it remained the property of the United States, the contention of plaintiffs in error being that neither the approved lists nor the patents covered the *locus in quo*, and that therefore the compromise agreement between the State of Arkansas and the federal government, including a relinquishment by the State of Arkansas of all claims under the Swamp and Overflowed Land Act of September 28, 1850 (except such lands as had theretofore been patented or were approved or confirmed under said act of September 28, 1850, the act of March 2, 1855, or the act of March 3, 1857), operated to revest complete title to the *locus in quo* in question in the United States.

In brief, the answer of defendant in error to these contentions is: First, that the title to the whole of

the township, unless it was previously vested in the state, passed to the State of Arkansas under United States patent dated September 27, 1858, the description in said patent being:

> "Township 12, North of Range 7 East.
>
> "The whole of the township (except Section sixteen), containing thirteen thousand eight hundred and fifteen acres and 67/100 of an acre." (See printed transcript, p. 209.)

Second, that the whole of said township was covered by the state selection and the subsequent approval thereof by the secretary of the interior under date of May 11, 1853 (see printed transcript of record, p. 208), and that said selection and approval operated to vest the legal title in the state under the terms of the act of March 3, 1857.

Third, that the Swamp and Overflowed Land Act of September 28, 1850, was a grant in *praesenti;* that title to the various swamp and overflowed lands in the State of Arkansas passed to that state under the terms of the grant; that the title passing to the state was conveyed by the state in 1893 to the Levee District and therefore the action of the state in 1898 in quitclaiming in general terms its remaining claims under the Swamp and Overflowed Land Act could not affect the lands in question.

BRIEF.

I.

COMPLETE TITLE TO THE ENTIRE TOWNSHIP PASSED TO THE STATE OF ARKANSAS UNDER THE SWAMP AND OVERFLOWED LAND ACT OF 1850.

The principal question in this case turns upon the construction of the approved state selection and the patent issued to the State of Arkansas under the Swamp and Overflowed Land Act of September 28, 1850 (9 Statutes at Large, 520; Revised Statutes, 2479). That act granted "the whole of the swamp and overflowed lands, made unfit thereby for cultivation, and remaining unsold on or after the 28th day of September, 1850," to the several states wherein such lands were situated. There is no question that the *locus in quo*—lands from which the timber sued for was cut—was in 1850 swamp or overflowed land. It is not claimed that this land was disposed of by the United States before that time. It is asserted, however, by defendants in error that the title to the lands in question did not pass to Arkansas because they say that neither the approved selection confirmed by the act of March 3, 1857 (11 Statutes at Large, 251) nor the patent issued to the State of Arkansas under date of September 27, 1858, included these lands.

The decree of the chancellor is shown on pages 212 to 213 of the printed transcript. The chancel-

lor found as a fact that all the corners of the township which includes these lands were established by government surveys at the time of the approval of the state selection by the Department of the Interior. This finding was confirmed by the judgment of the Supreme Court of Arkansas, appearing on page 215 of said transcript, and further by the opinion of that court on page 223 of said transcript (page 387 of the original record.) This fact also appears from the government surveys and plats of this and the surrounding townships of which Arkansas courts take judicial notice. (*Bittle* v. *Stuart*, 34 Ark. 224.) It appears, however, that the land in question was shown on the township plat to be included in an area extending in a northeasterly and southwesterly direction across the township which area is on the plat meandered and bears the label, "Sunk Lands" in the vicinity where the lands in question are shown, and in another place the label "Right Hand Chute of Little River." The section lines of the township stop at this meander line, and plaintiffs in error have contended, as is perhaps most clearly shown in their petition for rehearing (printed abstract, page 217), that "the court erred in ignoring the inner lines of the survey entirely and regarding the outside boundaries alone." In other words, their contention is that lands inside a township do not pass by a patent of the entire township because on the township plat these lands are meandered out. They also have contended that the acreage mentioned as the acreage of Township 12 North, Range 7 East, in the approved selection and in the patent subsequently issued, is the sum of the acreages

above this and other meander lines, and therefore, the approved list and the patent should be restricted to the lands appearing by the plat to lie above the various meander lines. (See counsel's brief, pp. 5 and 15.)

We have pointed out in our statement of facts that the sum of the several areas shown on the plat exceeds the area stated in the patent very materially. It follows that no argument can be successfully based on their assumed agreement.

Our position is that a patent of a whole township under the Swamp and Overflowed Land Act includes all the land within the township whether sectionized or not; that whatever the meaning of the meander lines they did not operate to exclude lands from the township or from the grant to the state, and that the statement of acreage is entirely immaterial. Counsel have not hitherto disputed the finding of the chancellor that the township boundaries were fixed. In addition to this finding both the chancellor in his decree cited above and the Arkansas Supreme Court in its opinion found as a fact that the lands within the meander line in question were at the time of the survey in fact land and not a body of water.

The position taken by counsel for plaintiffs in error seems to be founded on the idea that there is some requirement in the nature of things that the United States cannot convey lands unless those lands have been fully surveyed not only into townships, but even into sections, and we suppose subdivisions of sections. Such a contention is obviously unsound.

There can be no question that the United States may grant its lands by any description which will serve to identify them. Even if it be conceded that if an act of Congress required in express terms a certain sort of survey to be made before patents could issue under the act, no patent issued thereunder to lands not included in such particular kind of survey would be valid, still such is not the case here. The Swamp Land Act did not require that the lands be surveyed into sections or subdivisions, or in fact that they be surveyed at all. The requirement was that the lands be identified as coming within the terms of the act. Such has been the repeated ruling of the land department in regard to Florida where there were tracts of swamp and overflowed land larger in area than many townships. In spite of the fact that these lands had not been surveyed even into townships, the land department repeatedly held that a description identifying the lands would be sufficient for patenting.

In re State of Florida, 8 L. D. 65, 18 L. D. 26, 19 L. D. 251, 24 L. D. 147.

It may be noted also that some of the earlier surveys ordered by Congress in the Northwest Territory provided that only part of the townships should be subdivided.

See 1 Statutes at Large, 465, and generally 38 L. D., 4 *et seq.*

It is a general rule that where the description of lands in a conveyance is clear the entire area within the description will pass and that no exception exists unless that exception is clearly stated.

2 Devlin on Deeds, Sec. 979.

Wendall v. *Fisher,* 187 Mass. 81.

Certainly the description of the whole of a named township is on its face as clear as any description that refers to government surveys can be. No exception is expressed on either the approved list or the patents as shown on pages 207 to 209 of the printed record, but other than the exception of Section 16 which is not here in question, unless indeed either the statement of acreage or the presence of meander lines surrounding "sunk lands" creates such an exception. Indeed it may well be argued that the fact that there is an expressed exception of Section 16, part of which by the way, lies within the meander lines in question, itself under the well known rule of construction shows that no other exception was intended.

In the case of *Mitchell* v. *Smale,* 140 U. S. 406, at page 413, these words occur:

> "Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But *since the grant to the respective states of all swamp and overflowed lands therein, this cannot be done.*"

In other words, the government officials were without authority in the case at bar to make any express exception of the sunk lands or non-navigable rivers or lakes within the township patented in 1858. If the government was without authority by *express exception* to exclude these sunk lands and non-navigable rivers or lakes because they were included in the grant, no exception of such nature could pos-

sibly be *implied.* The same idea was evidently in the mind of this court when in deciding the case of *Kean* v. *Calumet Company* (190 U. S. 452, at page 459), it said:

> "The case is stronger if the land passed under the swamp land act, as has been held by the State Court with regard to this and similar patents."

THE STATEMENT OF AREA IN THE APPROVED LIST AND PATENT IS IMMATERIAL.

> "A recital in a conveyance of land that the tract contains a certain number of acres, unless there is an express covenant as to quantity, will always be regarded as a part of the description merely, and if inconsistent with the calls of the deed, will be rejected as surplusage."
>
> Warville on Abstracts, Section 207.

The case of *Bishop* v. *Morgan,* 82 Ill. 352, concerned the correct construction of a will by which there was bequeathed to Bishop "the Southeast Quarter of Section Number Ten * * * containing forty acres, more or less." In fact, said southeast quarter contained 160 acres. The court held:

> "We know of no adjudicated case or elementary rule by which the use of the words 'containing forty acres, more or less,' can be allowed to affect or modify descriptions such as 'the southeast quarter of said section' which is clear and certain as to location and boundaries. Quantity in the description of land is never allowed to control courses, distances, monuments or natural landmarks such as creeks, rivers, ponds or lakes."

This case is particularly applicable because, as

in the case at bar, no question of contract was involved directly or indirectly. The proportionate discrepancy between the actual area and the stated area was very much greater than in the present case.

The case of *Ufford* v. *Wilkins,* 33 Iowa 110, is a case where a tract containing forty-four acres was described in a conveyance as "being forty acres." The court said:

> "The rule is that when the quantity of land is mentioned in a deed as part of the description it will be rejected if it be inconsistent with the actual area of the premises as ascertained by known monuments or other certain description, where the tract is definitely described and limited, as in this instance, according to the original survey so that any surveyor can ascertain its contents and if within the boundaries according to the description there be less or more than the supposed quantity of land, the grantee takes all included within the description."

In the case of *Fuller* v. *Carr,* 33 N. J. Law 157, it is said:

> "If the premises are indicated by known and definite boundaries the quantity is of no importance; but if not, it may help to ascertain them."

In the very late case of *Veve* v. *Sanchez,* 226 U. S. 234, 240, this court, in commenting on a contention that the land was not covered by a mortgage because it lay beyond the quantity stated in the mortgage, said:

> "This makes the construction of the mortgage depend—not upon its language, but upon the quantity of land the mortgagor owned at

the date of its execution, and required the jury to make designation by *cuerdas* prevail over description by specific boundaries. This is contrary to the rule that calls for quantity must yield to the more certain and locative lines of the adjoining owners. Such lines are certain, or they can be made certain, and may be platted so as to show the exact course and distance. They are treated as a sort of natural monument and must prevail over the more general and less distinctive designation by quantity."

In *Powell* v. *Clark*, 5 Mass. 355, it is said:

"In a conveyance of land by deed in which the land is certainly bounded it is very immaterial whether any or what quantity is expressed for the description of the boundary is conclusive."

See also:

3 Washburn on Real Property (6th Ed.), Sec. 2322, page 386.

2 Devlin on Deeds, Sec. 1044.

Bowles v. *Craig*, 8 Cranch. 371.

Spreckels v. *Brown*, 212 U. S. 208.

Hyde v. *Phillips* (Wash.), 112 Pac. 257.

Wright v. *Wright*, 34 Ala. 194.

Dalton v. *Rust*, 22 Tex. 133.

Hall v. *Mayhew*, 15 Md. 551.

Pierce v. *Faunce*, 37 Me. 63.

Reddick v. *Leggat*, 7 N. C. (3 Murph.) 539.

Hunter v. *Morse*, 49 Tex. 219.

Jackson v. *Barringer*, 15 Johns. 471.

Kruse v. *Scripps*, 11 Ill. 98.

Petts v. *Gaw*, 15 Pa. St. 218.

Doe v. *Porter*, 3 Ark. 60.

Towel v. *Etter*, 69 Ark. 34.

It has been repeatedly decided by this and other courts, that inasmuch as the areas shown on plats of surveys made before the Swamp Land Acts were passed, were made primarily for the purpose of ascertaining the quantity of upland for which a purchaser from the government should pay, they had no effect in restricting patents under either the Swamp Land Act of 1849 applying to Louisiana alone, or the Swamp Land Act of 1850, which is concerned in this case.

Kean v. *Calumet*, 190 U. S. 452.

McDade v. *Bossier Levee Board*, 109 La. 626.

Tolleston Gun Club v. *State*, 141 Indiana 197; 38 N. E. Rep. 214.

Kean v. *Roby*, 145 Indiana 221.

The case of *McDade* v. *Bossier Levee Board*, 109 La. 626 (33 So. Rep. 628), applies exactly to this case except for the immaterial fact that the approved list there concerned was of sections and not of townships.

The suit was one for damages by McDade, the owner of lands lying above the meander line of "Red Shoot Lake," against the Levee Board for slandering his title to lands within said "lake."

"Red Shoot Lake," as it existed in 1849 and 1850, the dates of the two swamp land acts that affect Louisiana (9 Statutes at Large 352 and 519), was a shallow unnavigable lake about seven miles in length, with an extreme width of about a mile. It appears that it did not cover any single section entirely, but covered the corners of some and passed through the middle of others:

> "The sections are all laid off as regular sections except that the space occupied by the lake is left blank * * * not traversed by any lines." (p. 629.)

McDade's predecessors in title bought the lands outside the meander line from the state. Subsequently the state granted all its lands in the region concerned to the Levee Board, and the building of levees had the effect of reclaiming the land in the lake.

The Court held:

First. That the bed of this lake passed from the government to the state under the approval of the state selections of whole sections.

Second. That the lands purchased by McDade's predecessors in title, from the state, which lands were purchased by the acre, carried no rights outside the acreage purchased.

Third. That the grant to the Levee Board vested title in it to the bed of the lake.

The court says (p. 630):

> "It is true the section lines were not run across the traverse of the lake, and the exact acreage was not ascertained; but the corners of the sections were established, and the lake was shown to be enclaved by lands of a swamp and overflowed character, and the section lines were run to the margin of the lake. This identified the lands and determined their swamp and overflowed character, and nothing more was required for the purposes of the acts of 1849 and 1850.
>
> For the purposes of those acts the exact area did not need to be ascertained, since the grant comprised the whole of the swamp and over-

> flowed lands within the borders of the state, regardless of area."

The court then held that the survey was made in 1836, before the passage of the Swamp Land Acts, and that the areas ascertained were those of dry land, for the purpose of future sales, and therefore the wet land was left out of the computation of acreage, but that the survey

> "was, nevertheless, just as efficacious for the purpose of identifying the lands and determining the question of their wetness or dryness and of serving as a basis for the selection of the swamp and overflowed lands in the township as if made specially for the purpose of such selection." (p. 631.)

The court further said:

> "Ascertainment of acreage is indispensable in the case of land to be thereafter disposed of by the acre, but it is utterly unnecessary in the case of land to be disposed of by selection and approval under swamp land grants of 1849 and 1850. All that is necessary in carrying out those grants is that the lands be identified and their swamp character determined. The whole of the swamp lands, regardless of area, having been granted, the area can cut no figure in the matter of the selection and approval under the grant. Whether the area in the selection list be of one acre or of a million acres can make absolutely no difference. In fact, the selection list might leave out altogether the specification of area and no harm be done."

The court then considers the contention that the Land Department of the government had held that the beds of non-navigable lakes did not pass under the Swamp and Overflowed Land Act, and it comes to the conclusion that the Land Department has not so

held, but that if it did so hold it would be mistaken, saying (p. 633):

> "Are we to hold that the very water-covered lands that were to become dry as the direct, necessary and inevitable result of the building of the levees in aid of which the grants were made, were not land within the purview of the grants? Why, we should be going against the plain intent of the acts.
>
> "If Congress had intended that swamp lands alone should pass, why add the word 'overflowed'? The word 'swamp,' without the addition of the word 'overflowed,' would have conveyed all lands so lacking in drainage as to be temporarily covered by water in rainy seasons. If such lands alone were intended to be conveyed, why add the word 'overflowed'? Has the word 'overflowed' any other meaning than 'water-covered'? Water-covered areas are not to be taken out of the operation of the grant by so simple a process as calling them lakes. The land in controversy was not a lake, except in the sense in which the permanently water-covered parts of all swamps are lakes. Hunters walked all over it in the dry season. In some parts it was a mere slough."

For fear of wearying the court, we abstain from further quotations from this case, but the entire opinion down to the bottom of page (or column) 635 is very illuminative, and it seems to us an entirely correct exposition of the effect of the Swamp Land Acts and selections thereunder upon the title to lands meandered out by United States surveys made prior to the passage of either of said acts. The remainder of the opinion and the opinion on rehearing are devoted to details of the case not in any way bearing upon the present suit.

In *Stoner* v. *Rice*, 121 Ind. 51, cited with approval

in the opinion in *Kean* v. *Calumet*, it was held that where a shallow lake or pond appeared to be situated within the limits of Government subdivisions, although meandered on the Government plat, it passed to the patentees of the subdivisions, because included within their limits.

See also:

People v. *Warner*, 116 Mich. 228.

The case of *Tolleston Gun Club* v. *State*, 141 Indiana 197, 38 N. E. Rep. 214, is in point. On the question of construction of the government patent we can see no distinction between this case and the case at bar, unless, indeed, it should be held, as seems to us hardly possible, that a patent of a township is as regards lands included within its borders to be construed differently from the patent of a section. It appears that in this case both the selection under the Swamp Land Act and the patent covered a number of whole sections. The acreage stated was very much less than the entire acreage of both wet and dry lands in the sections. For instance, the selection and patent covered "all of 21 and 22," which was stated to have an acreage of 588.85 acres, whereas, including the overflowed lands in the sections, they appear from the case to have been full sized sections with a combined acreage of 1,280 acres.

It appears that the lands in dispute consisted of a tract about six miles in length and from three-fourths of a mile to a mile and a quarter in width on each side of the Little Calumet River; that the original field notes called for a "lake," while on the plat it was marked "impassable marsh." It

will be seen that there is an exact correspondence between these lands and the lands in dispute in the case at bar. The court found that all the section corners were marked, as the court has found in this case, that the township corners and the outer boundaries of the township were established. The court notes that the sections were all numbered regularly, as is the case with Township 12 North, Range 7 East:

> "A part of each section lies without and a part within the meander line. The sections are therefore as completely defined by corners, section lines and numbers as any other sections of a United States survey. The whole territory in dispute, including the river itself, is covered by these sections. No land or water is left unsurveyed. All that is peculiar to the survey is that parts of the sections are without and parts within the meander lines; the parts without the meanders being subdivided into lots, while the parts within are not marked as subdivided. In the list certified from the general land office, as we have seen, the sections in question are described as 'All of 12, 15, 17, 18, 19, 20, 21, 22 and N. W. ¼ 23.' There can be no doubt of the meaning of this description. It covers all of the sections named, both within and without the meander lines." (p. 206.)

In regard to the question of acreage which was raised by counsel, the court says (italics are ours):

> "These red entries are evidently office figures, and were undoubtedly placed in the list to indicate the acres of dry land in the several sections, being the land outside the meander lines. They do not, however, properly speaking, constitute any part of the description of the sections. They simply indicate the dry land, *and were of use to the officials and to the pur-*

> *chasers of the land in determining the price that should be paid for it.* As frequently decided, meander lines are not boundary lines, unless expressly made so in the instrument of conveyance. The full title of the grantor to the whole section or other division named, both within and without the meander line, the wet land as well as the dry, passes with the deed." (p. 207.)

The above quotations are from that part of the opinion of the court considering the effect of the act of March 3, 1857, as confirming the title to lands selected by the state. It appears that the patent to these lands was a patent for fractional sections, the areas stated being apparently the same as that in the approved list. In this regard the court further says:

> "The term 'fractional,' as applied to the sections named in the patent, refers simply to the circumstance that they do not contain 640 acres each of dry land. As we have seen, however, the sections were fully surveyed; the corners and boundary lines were determined and recorded in each instance. It follows, from what we have already said, and from the authorities above cited, that the conveyance of the fractional sections carried title to the extreme boundary lines of the sections. All was conveyed. There remained to the United States neither upland nor lowland, whether exposed to the surface or covered by the waters of the marsh or the river. The state took to the section lines." (p. 208.)

The later case of *Kean* v. *Roby,* 145 Indiana 221, 42 N. E. Rep. 1011, involved as did the Tolleston Gun Club case, a dispute between the state or the state's grantees and claimants under patents from

the United States based upon a resurvey of lands meandered out in the first survey. The facts were, as to some of the lands, that one of the section corners and portions of the boundaries of the section were not actually run out on the ground because water was encountered. The west boundary of said section (12) coincided with the said line which, however, does not appear to have been actually run over the waters of the so-called Wolf Lake, and the south line of said Section 12, was only run out in part. The Court quotes from Section 2396 of the United States Revised Statutes as answering any argument based upon these facts as follows:

> "The boundary lines which have been actually run and marked shall be ascertained by running said lines from the established corner to the opposite corresponding corners, but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners to the north and south or east and west lines, as the case may be, to the water course, or other external boundary of such fractional township." (p. 227.)

This case and the preceding one were cited with approval in *Kean* v. *Calumet*, 190 U. S., at page 459. It is to be noted that the theory of these Indiana cases supported by the opinion of this Court in the Kean case is based not upon any question of riparian rights whether or not such might have been the basis of the decisions, but wholly upon the proposition that the patent under the Swamp Land Act of a whole section or a whole "fractional" section conveyed to the state everything within the

external limits of the section and that it was not necessary that every foot of the external limits should have been actually run out on the ground, but that where "lake" or "impassable swamp" interfered with the actual running out of a portion of the line, such interference would be disregarded where the whole survey sufficiently identified the land covered. This conclusion is further emphasized by the opinion in *Kean* v. *Calumet* where it is said (page 460):

> "It is said that the land under water was not embraced in the survey of 1834. It would seem from the plat and the field notes that the sections and dividing lines were clearly marked off and posts set. The case is similar to *Kean* v. *Roby*, 145 Indiana 221, where the survey was pronounced sufficient. No difficulty was felt on the ground that the survey did not cover the submerged land in *Hardin* v. *Jordan*, 140 U. S. 371. But furthermore, the land was selected as 'swamp and overflowed lands' by the State. It not appearing otherwise, the selection must be presumed to have included the land overflowed, and if so it was confirmed to the state by the Act of March 3, 1857, c. 117, 11 Stat. L. 251, Rev. Stat., Sec. 2484. The confirmation encounters none of the difficulties of cases like *Stoneroad* v. *Stoneroad*, 158 U. S. 240. The land surrounding the water, at least, was surveyed so that the identification of the submerged portion was absolute. We are of opinion that the State of Indiana got a title to the whole land in dispute."

Meander Lines.

The cases of *McDade* v. *Bossier Levee Board*, *Tolleston Gun Club* v. *State*, *Kean* v. *Robey*, and *Kean* v. *Calumet Co.*, cited at some length above

all support the rule that meander lines in government surveys and plats are principally intended not as boundary lines, but to assist in fixing the acreage of uplands for which a purchaser was expected to pay.

Meander lines were "run for the purpose of ascertaining the exact quantity of the upland to be charged for." (*Hardin* v. *Jordan*, 140 U. S. 371, 380.) Especially must this have been true in regard to surveys made while the policy of the government was still to sell off its public lands at a fixed price per acre, as was the case when the subdivisional surveys of Township 12 North, Range 7 East were made, but the surveyors in fact used meander lines not only to mark out bodies of water, either navigable or not, but also in some cases to mark out government reservations, Indian reservations or swamp (See *Niles* v. *Cedar Point Club*, 175 U. S. 300), and in this case to mark out "sunk lands."

While in general therefore meander lines are not boundary lines, yet where lands are sold by the acre and an outside meander line taken with the other boundaries of the tract conveyed in fact encloses the acreage bought, paid for, and intended to be conveyed and, as found to be the fact in this case (Printed Transcript p. 212), the meander line does not mark the shore of a permanent body of water, in such cases the courts have held the meander line to be part of the boundary, and the acreage sold and recited to be material.

Security Land Co. v. *Burns*, 193 U. S. 167.
French-Glenn Live Stock Co. v. *Springer*, 185 U. S. 47.

Niles v. *Cedar Point Club*, 175 U. S. 300.
Horn v. *Smith*, 159 U. S. 40.

See also

Western Hawaiian, Etc., Co. v. *National Bank*, 35 Ore. 298, 57 Pac. Rep. 912.

We have yet to see, however, a decision of this court or any other court to the effect that a plat showing lands meandered out within the external limits of the land actually described operates to exclude the lands so meandered from a grant. It would seem that such a conclusion would be impossible in any event. It is certainly impossible where the very terms of the transaction make the question of the area absolutely immaterial and when therefore the recital of acreage is not merely surplusage as in an ordinary deed with a clear description but is a statement of a fact having not the remotest bearing on the transaction, and can be explained only on the basis that the employes of the land office being accustomed to drawing patents for *purchasers* from the government where the acreage was of importance in fixing the purchase price, followed this custom blindly.

This distinction which we think exists between the effect of meander lines and a statement of acreage in a patent where the right is grounded upon the character of the land and one where the right is grounded on a purchase at an acre price, is clearly recognized in the case of *McDade* v. *Bossier Levee District*, 109 La. 626, at page 635, where it is said:

> "In the next place, there exists between the selection and approval in question, and the con-

veyance by the state to plaintiff's authors, this radical difference: That the one was nothing more than an act declaratory of the character of certain lands, whereas the other was a sale at so much per acre. In the one, acreage cut no figure; in the other, it was the all-important point. A survey made to serve as a basis for the one would have for its sole purpose the identifying of the land and the fixing of its character. On the other hand, a survey made to serve as basis for the other would have for its purpose the ascertainment of the acreage."

II.

PLAINTIFFS IN ERROR HAVE SHOWN NO TITLE IN THEMSELVES TO THE LAND IN QUESTION.

As noted above, the defense of plaintiffs in error to the claim of the Levee District is, first, title in themselves; second, title in the United States.

The claim of title in plaintiffs in error is based by them upon alleged riparian rights accruing to them as owners of the land outside the meander line. This claim necessarily involves construction of the state patents granted in 1871 to their predecessors in title, and on this question, essentially one of state law, it would seem that the decision of the Arkansas Supreme Court is final.

Moreover, the Arkansas courts have found as a fact that the "sunk lands" were in 1850 *lands* and not *water*. It is elementary that riparian rights exist, in any case, only over the bed of bodies of water. No such rights arise from ownership of land abutting on marsh or its equivalent "sunk land."

Niles v. *Cedar Point Club*, 175 U. S. 300, 308.

West Hawaiian Co. v. *Farmers' and Traders' National Bank*, 35 Ore. 298; 57 Pac. 912.

Decree of Arkansas Supreme Court in this case, see Printed Transcript, p. 223.

As bearing upon the sense in which the term "sunk lands" was used by the United States surveyors it is material to note that in the government survey of Township 13 North, Range 7 East, whose south line is the north line of the township in question, the terms "sunk lands" and "swamp and overflow" were apparently used as equivalents, and that in the plats, both of Township 13 North, 7 East and of Township 13 North, 8 East, the surveyors repeatedly noted "sunk lands" on sectionized areas without meandering such sunk lands (see plats of all three townships at the end of the Printed Transcript).

However, even if the notation "sunk lands" were to be taken as proving the existence of a permanent body of water in 1850, this would only result in an additional reason why title to the sunk lands passed to the State of Arkansas under its approved list and patents.

See *Hardin* v. *Jordan*, 140 U. S. 371.
Mitchell v. *Smale*, 140 U. S. 406.
Kean v. *Calumet*, 190 U. S. 452.

As noted above, if title passed to the state by virtue of the approved lists or patent the question of what became of the title afterwards is necessarily one of local law.

III.

THE COMPROMISE AGREEMENT BETWEEN THE UNITED STATES AND THE STATE OF ARKANSAS MADE IN 1898 DOES NOT AFFECT THE LAND IN QUESTION.

As pointed out above, the land having been both included within a state selection and a government patent falls within the express exception of the compromise agreement. (See Appendix, p. 38.)

Act of Congress of April 29, 1898 (30 Statutes at Large, 367).

The Swamp and Overflowed Land Act of September 28, 1850, was a grant in *praesenti* and passed equitable title to the state. This title the state conveyed to the Levee District. The Levee District having at least equitable title and there being nothing further to be done by the government even on the supposition that the legal title had not passed to the state and so to the district, except the ministerial duty of issuing a patent, the Levee Disrict was entitled to assert its ownership as against all third persons.

Wright v. *Roseberry*, 121 U. S. 488.

Tubbs v. *Wilhoit*, 138 U. S. 134.

Iowa, etc., Land Co. v. *Blumer*, 206 U. S 482.

This court has indeed held in *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, that even in spite of the confirmatory act of March 3, 1857, where a patent had not issued to lands claimed under the Swamp and Overflowed Land Act the secretary of the interior might investigate the character of the lands to see whether they were swamp and

overflowed lands, or lands fit for agriculture at the date of the grant, but even in this case the fact that equitable title passed under the act if the lands were in fact swamped and overflowed, and that the only question that could be raised was as to the character of the land was clearly recognized. (See page 593.)

It seems moreover that the theory of this case is clearly inapplicable to a situation where the selection list approved by the secretary prior to the act of March 3, 1857, showed selections by whole sections or townships, for it is said in *Kean* v. *Calumet*, 190 U. S. 452, 460:

> "But furthermore, the land was selected as swamp and overflowed lands by the state. It not appearing otherwise the selection must be presumed to have included the land overflowed, and if so, it was confirmed to the state by the act of March 3, 1857. * * * The land surrounding the water at least was surveyed so that identification of the submerged portion was absolute." (Page 460.)

It seems safe from the authorities cited above to assume that when the legislature of Arkansas passed the Act granting State lands to the Levee District, even if it could be conceded that full legal title did not pass, at least the equitable title passed.

The language of the state legislature is:

> "That for the purpose of assisting the citizens of the state to build and maintain a levee along the St. Francis front in this state, and in consideration of the general good of the state; that all the lands of this state lying within said levee district except the sixteenth section school lands, and all the right or interest the state has or may have within the next five years, by reason of forfeiture for taxes or to any lands within said levee district except said

sixteenth section school lands, is hereby conveyed to said levee district under the following restrictions and limitations." (Acts of Ark. 1893, p. 172.)

The restrictions and limitations referred to, so far as material, are contained in the following language:

"The said levee district may sell said lands for the minimum prices of $2.50, $1.50 and 50 cents per acre as to grade, or may issue the bonds of said levee district secured by a mortgage on said lands or any part thereof, and payable as the board of directors may determine; and the treasurer of the levee board of said district, upon the receipt of payment of any part or parcel of said lands, shall certify the same to the president of said board, who shall execute a deed in the name of said corporation to the purchaser of said lands, the money arising from such sales or issuance of bonds to be applied solely to the construction and maintainance (maintenance) of the levee of said levee district.

Sec. 2. That said lands shall be exempt from state and county taxes for five years, if not sooner sold by said district, and at the expiration of the term of five years from the passage of this act, all of the said lands not previously sold by said district, shall be assessed in the name of said district for said state and county taxes."

This grant to the Levee Board was one that could not be revoked or called back by the State Legislature. It is to be observed that it was a grant in fact for the benefit of the residents of the particular district; that it did not have to do with the exercise of general governmental powers, and that the provision quoted above as to taxation makes it evi-

dent that in the mind of the legislature the Levee District was to hold the land as a property holder and not in trust for the state, for the state would hardly levy a state tax on its own property. This is further proven by the fact that the Levee Board is given power to mortgage this land, a power that would be absolutely nugatory if the state had the right to revoke the grant in whole or in part.

Cases are not wanting where similar grants have been held irrevocable even by express action of the state legislature.

The case of *Grogan* v. *City of San Francisco*, 18 Cal. 590, is very much in point. The holding of that case on this question is well stated in the syllabus, as follows:

> "There is no difference in the inviolability of a contract, between a grant of property to an individual and a like grant to a municipal corporation. So far as municipal corporations are invested with subordinate legislative powers for local purposes, they are mere instrumentalities of the State for the convenient administration of the government, and their powers are under the entire control of the legislature; they may be qualified, enlarged, restricted or withdrawn at its discretion. But when they are empowered to take and hold private property for municipal uses, such property is invested with the security of other private rights."

So in *Franklin County Grammar School* v. *Bailey*, 62 Vermont 467 (10 L. R. A. 405), it was held that a legislative grant of premises to the grammar school, apparently a *quasi* municipal corporation, vested a title which the legislature was without constitutional power to take away.

And in *Proprietors of Mount Hope Cemetery* v. *City of Boston,* 158 Mass. 509 (33 N. E. Rep. 695), it was held that Mount Hope Cemetery could not be taken away from the City of Boston by the legislature but that its ownership was protected under the constitution of Massachusetts and of the United States so that the legislature had no power to require its transfer without compensation.

See also:

Jackson v. *Dilworth,* 39 Miss. 772.

Higginson v. *Slattery,* 212 Mass. 583 (99 N. E. Rep. 523, 525).

Webb v. *N. Y.,* 64 How. Pr. 10.

Dillon on Municipal Corporations, 3d Ed., p. 91.

And in *Board of Education* v. *Blodgett,* 155 Ill. 441, 450, it is said:

> "The political rights and privileges delegated to counties, school districts and cities, are not, within the constitutional provisions, against laws which impair vested rights, but their property rights are protected by the same constitutional guarantees which shield the property of individuals from legislative aggression."

It would seem that this rule that the property rights of municipal corporations cannot be taken away by legislative action, without compensation, would apply more particularly to *quasi* municipal corporations such as drainage districts, school districts and levee districts whose property is held, from the very nature of things, primarily for the benefit of the inhabitants of the district. Especially must this be the case where it is contemplated that the district should expend money and incur financial obligations on the faith of the grant made.

On this question the Supreme Court of Arkansas, in its decision in the present case, says:

> "This grant to the Levee Board having been made prior to the state settlement with the government and relinquishment of its right to all the remaining swamp lands to which it may have had claim under the Swamp Land Grant, was not affected by such settlement."

There is another point in this connection, and that is, that even if the State of Arkansas had power to revoke this grant, any exercise of that power should be unequivocal. There is nothing in the agreement of compromise which shows any attempt by the legislature to revoke this grant. The Arkansas legislature, by its joint resolution passed March 10, 1897 (Laws of Ark., 1897, p. 88) in authorizing a change in the compromise agreement, not here material, interpreted that agreement as an obligation on the part of the State of Arkansas *"to release and quitclaim to the United States all claims adjusted or unadjusted."* Moreover, Congress in adopting the compromise expressly provided that the title of all persons who had purchased from the State of Arkansas and held deeds, was confirmed and made valid as against any claim or right of the United States. (See Sec. 3 Act of April 29, 1898—30 Statutes at Large, 367.)

We do not claim that the title to the district falls literally within the provisions of this section but it does fall within its intent and it is further evidence to show that it was the intent of neither party to the compromise that it should operate to revoke titles granted by the State of Arkansas. Moreover, the only reason why the district did not have a deed was

because the grant from the state took the place of a deed. As noted above, the district had, in fact, paid its consideration for the grant by completing the St. Francis Levee in 1897.

CONCERNING THE SUGGESTIONS FILED BY THE SOLICITOR GENERAL ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE.

The suggestion of the solicitor general calls the attention of the court to the fact that the land involved in this suit is a small part of a much larger acreage similarly or somewhat similarly situated.

The solicitor general is, we believe, mistaken in his statement that the record in the present case is silent as to the existence of the government's claim (unless he intends to say that the record in this case is silent as to the fact that the government is asserting a claim to some or all of these sunk lands), for the assignments of error are grounded in part upon the suggestion that the government may have title.

It is further to be noted that the decision of First Assistant Secretary Pierce in the Arkansas Sunk Lands case, 37 L. D. 342 and 462, mentioned by the solicitor general, is contrary to two former opinions of the department; one written by Secretary Hoke Smith in August, 1894, the other written by Secretary Hitchcock November 17, 1892; also that the decision of First Assistant Secretary Pierce is based principally on the decision of the Arkansas Supreme Court in the case of *Little* v. *Williams*, 88 Ark., 37, now pending in this court on writ of error and expressly distinguished by the Arkansas Supreme

Court in its opinion in the present case. It further appears that Secretary Pierce did not consider the question whether the selection and patenting by whole townships did not include all the lands within the limits of the townships, which is the ground for the decision by the Supreme Court of Arkansas in the case at bar. It is further to be noted that nowhere in the departmental opinions is there any finding that the lands were not swamp or overflowed. In fact, it is stated that they were such. (37 L. D. 348.)

It seems evident to us that if the Supreme Court of Arkansas is right in its holding that a patent of a whole township includes all the land within the township, or if the conclusion that the selection of the whole township, approved by the secretary and confirmed by the Act of March 3, 1857, operates to vest title in the entire township, then it is a matter of importance to every one concerned that this court should put at rest any doubt as to the meaning of such patent. Obviously, if homesteaders are going on these lands, as suggested, under a false impression, it is of importance that the proper interpretation of the state's original title should be fixed in order that innocent persons may be guarded against a waste of their time and labor.

As early as the case of *Irvine* v. *Marshall*, 20 Howard 558, 567, this court said of the rulings of the Land Department:

> "But supposing these to be in accordance with the above suggestion they could by no means control the action or opinion of this court in expounding the law with reference to the rights of parties litigant before them; and

> this they must do in accordance with their own convictions uninfluenced by the opinion of any and every other department of the Government."

This court has been obliged repeatedly in guarding the rights of owners of real estate under early patents from the government to overrule the Land Department, when it has misconstrued government surveys and patents and has acted on the assumption that a meander line was intended primarily as a boundary line. The cases of *Hardin* v. *Jordan*, 140 U. S. 371; *Mitchell* v. *Smale*, 140 U. S. 406, and *Kean* v. *Calumet Company*, 190 U. S. 452 mentioned above, are striking examples. In all three cases the department not only ruled that lands lying within a meander line did not pass under patents to the legal subdivisions including them, but proceeded to make additional surveys of such land, sold it and issued patents therefor. Nevertheless this court did not hesitate to hold that these patents were void, and thereby necessarily held that the department had by the earlier patents lost jurisdiction of the land in controversy.

CONCLUSION.

Counsel for plaintiffs in error state that the "whole township" theory is against numerous decisions of this court and against the rules of the Land Department and the entire system for the survey and disposition of public lands. Counsel cite in support of this contention two decisions of this court, *Cragin* v. *Powell*, 128 U. S. 691, and *Gazzam* v. *Phillips*, 20 Howard 372, two decisions of First Assistant Secretary Pierce of the Interior Department, 37 L. D. 345 and 462, and *Little* v. *Williams*, 88 Ark. 37.

As to these authorities it may, we think, be fairly said that the two cases cited from this court have no application whatever; that the Arkansas decision was held by the same court that rendered it not to apply to the present case; and that the decisions in the Interior Department are contrary to the judicial decisions both of this and other courts. These Department decisions proceed on the false assumption that the township lines were not ascertained and on the irrational theory that a patent under the Swamp and Overflowed Land Act could only cover lands subdivisionally surveyed. It may further be remarked that later on in their brief (p. 22) counsel severely criticise these Land Department Decisions. Counsel admit (p. 21) that the case of *McDade* v. *Levee District*, 109 La., page 626, and *People* v. *Warner*, 116 Mich. 228, are authorities in favor of what they

term the "whole township" theory." They should certainly have added *Kean* v. *Calumet, Tolleston Gun Club* v. *State,* and *Kean* v. *Robey,* all discussed above, and the decision of the Arkansas Supreme Court in the present case.

Counsel endeavor throughout their brief to make it appear that our case depends upon an attack on the United States Government surveys. We confess ourselves totally unable to see how a claim that a patent to a whole township means what it says is an attack upon the survey. For our case rests on the idea that a patent to a township conveys the entire township and not merely portions thereof, that it does not leave in the United States the legal title to various irregularly shaped strips of land zigzagging through the township or nipping its edges, merely because the surveyors found it difficult to extend all their lines across morasses.

The proposition that full title to the area in question passed to the State of Arkansas under the selection, the approval thereof, and the patent from the United States, and the proposition that the compromise agreement of 1898 between the United States and the State of Arkansas had no bearing on these lands because the state's title had already been conveyed to the District and for the further reason that the State did not surrender any lands already patented or confirmed to it, both of which propositions we respectfully submit we have above established, together constitute the basis for the decision of the Supreme Court of Arkansas, to reverse which this writ of error is pending. This decision is set out fully in the printed transcript at pages 222

to 224. Counsel for plaintiffs in error earnestly contended that this decision is inconsistent with the former decision of the same court in the case of *Little* v. *Wililams,* 88 Ark. 37. That court had no difficulty in distinguishing the two cases.

This distinction rests on two grounds:

First, the stipulated facts in the Williams case showed the selection, approval and patent only of so-called "surveyed" lands, that is, sectionized lands lying above the meander line, while in the present case the proof shows a patent of the entire township whose boundaries clearly surround the land in question.

Second, the *locus in quo* in the Williams case was shown as *water* on the plat, while in this case it appears as ***land.***

As the present controversy is in no way concerned with obligations undertaken since or rights arising upon the faith of the earlier decision, it seems obvious that the extent of the application of that decision is a question of state law.

So far as the law of Arkansas is in point we submit that the decision of its Supreme Court in the case at bar must be taken as the authoritative expression of that law.

We ask that the decision of the Supreme Court of Arkansas in the case at bar be affirmed.

Respectfully submitted,

SAMUEL ADAMS,
H. F. ROLESON,
J. C. HAWTHORNE,
N. F. LAMB,
Attorneys for Defendant in Error.

APPENDIX.

EXTRACTS FROM COMPROMISE AGREEMENT EFFECTIVE, WITH CERTAIN CHANGES, UNDER ACT OF APRIL 28, 1898.

"CITY OF WASHINGTON, DISTRICT OF COLUMBIA. } ss.

This indenture, made this 23d day of February, 1895, between John G. Carlisle, Secretary of the Treasury, and Hoke Smith, Secretary of the Interior, under the power and authority conferred by an act of Congress approved August 4, 1894, entitled "An act to authorize a compromise and settlement with the State of Arkansas," parties of the first part, and James P. Clarke, governor of the State of Arkansas, acting under the powers conferred by the general assembly of the State of Arkansas, approved April 8, 1880, party of the second part, witnesseth:

* * * * * * * *

3. As a further consideration for the surrender of the aforesaid bonds, coupons, etc., the party of the second part hereby relinquishes and quitclaims to the United States all claims or demands, adjusted or unadjusted, growing out of the act of September 28, 1850, known as the swamp-land act; also, all land or cash indemnity growing out of the acts of March 2, 1855, and March 3, 1857; also, all claims for indemnity school lands; the residue of salt-spring lands; the residue of the lands under the

courthouse and jail grant (Act June 15, 1832); the residue of lands under act of September 4, 1841, for internal improvements; the residue of the grant under the acts of March 2, 1831, and June 3, 1836, for public buildings, and all other claims or demands of whatever nature or character.

The parties hereto agree that the land now patented, approved, or confirmed, to the State of Arkansas under the acts of September 28, 1850, March 2, 1855, and March 3, 1857, shall constitute the full measure due the state under the said swamp-land acts, except, however, that the lands described in the following lists shall be patented to the state, namely: List No. 1, containing 12,640 acres, denominated "approved, but not listed;" and List No. 2, containing 4,960 acres, denominated "Confirmed, but not listed;" which lists were transmitted to the Secretary of the Interior on November 17, 1894, by Letter "M" of the Commissioner of the General Land Office.

* * * * * * * *

Nothing in this settlement and agreement is intended to or shall in any connection be held to prejudice the rights of the State of Arkansas to assert and establish her title to any lands which were granted or confirmed to her by the said acts approved September 28, 1850, March 2, 1855, and March 3, 1857, in so far as the same is disputed by those claiming under any subsequent grant made or claimed to have been made, the scope and purpose of this settlement being hereby declared to be the adjustment of all disputes between the United States and the State of Arkansas, and to leave undisturbed incidental con-

troversies between said state and other parties in which the United States is not beneficially interested.

* * * * * * * *

In testimony whereof we have hereunto subscribed our respective names this the day and year first above written.

J. G. CARLISLE,
Secretary of the Treasury.

HOKE SMITH,
Secretary of the Interior.

JAMES P. CLARK,
Governor of Arkansas."

5

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

Supreme Court of the United States

October Term, 1913.

CHAPMAN AND DEWEY LUMBER COMPANY AND CHAPMAN AND DEWEY LAND COMPANY, *Plaintiffs in Error,*

vs.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT, *Defendant in Error.*

No. 82.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

H. F. ROLESON,
SAMUEL ADAMS,
Attorneys for Defendant in Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

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vs.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT, *Defendant in Error*.

No. 82.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

In view of what the court has said in the case of Little vs. Williams, decided at the present term, regarding the relationship of the State of Arkansas and the Board of Directors of the St. Francis Levee District, and the effect of the Arkansas Compromise Act of 1897, we think proper to call the court's attention to certain other acts of the Legislature of the State of Arkansas and some decisions of the Supreme Court of that State.

In Little vs. Williams, this court uses the following language concerning the St. Francis Levee District:

"The district was a mere political subdivision of the State, created by the latter, and invested with authority to construct and maintain levees to protect lands within its limits from overflow by the waters of the Mississippi River, and to levy and collect taxes and take other measures to that end—Laws Ark., 1893, pp. 24, 119. It was essentially a subordinate agency of the State, was exercising a power of the State for its convenience, could have no will contrary to the will of the State, held its property and revenue for public purposes, and was in all respects subject to the State's paramount authority."

The St. Francis Levee District was created by the Act of February 15, 1893, of the Legislature of Arkansas (Acts Ark., 1893, pp. 24 to 36). Section 5 of that Act provides as follows:

"Section 5. That for the purpose of building, repairing and maintaining the levee aforesaid and for carrying into effect the objects and purposes of this Act, the Board of Levee Directors shall have power, and it is hereby made their duty, to assess and levy annually a tax not exceeding five per cent. of the increased value or betterment estimated to accrue from protection given against floods from the Mississippi River by said levee on all lands within said Levee District, *provided, that said Board of Directors shall call a meeting of the land owners in each of the respective counties within said Levee District in each county* by posting notice of the time and place of said several meetings in ten conspicuous places in each county, ten days before the day fixed for the meeting, at which time the proposition to levy said annual assessment shall be submitted to said land owners, *and if a majority of the land owners in such Levee District shall be at said meeting in person, or by their legal proxies, and two-thirds of those shall vote for such assessment,* it shall be the duty of said Board of Directors to levy said tax."

Later at the same session of the Legislature an act was passed, which was approved March 29, 1893, (Acts of 1893, page 172), apparently not noticed by this court in considering the Little case. The first clause of that act is as follows:

> "That, for the purpose of assisting the citizens of the State to build and maintain a levee along the St. Francis front in this State, and in consideration of the general good of the State, that all of the lands in this State lying within the said Levee District, except the 16th Section school lands, and all the right or interest the State has or may have within the next five years, by reason of forfeiture for taxes, or to any lands within said Levee District, except said Section 16 school lands, is hereby conveyed to said Levee District, under the following restrictions and limitations"

Said act also authorized the Board of Directors of the St. Francis Levee District to sell said lands at stated prices, and also authorized the Board to issue bonds of said Levee District, *"secured by mortgage on the said lands,"* or any part thereof, and payable as the Board of Directors may determine.

Section 2 of the Act provides:

> "That said lands shall be exempt from State and county taxes for five years, if not sooner sold by said District, *and at the expiration of the term of five years from the passage of this Act, all the said lands not previously sold by said District shall be assessed in the name of said District for said State and county taxes."*

If, as a matter of law, these lands still belonged to the State, and were subject to disposition by the State, and the grant to the Levee District amounted to nothing more

than a simple placing of the State's lands within the hands of said Board, then the enactment of Section 2 quoted cannot be accounted for. State lands were not subject to assessment or taxation.

The fact that the title to these lands passed absolutely to the Board of Directors of the St. Francis levee District, and that the State had no further right or interest in them, was held by the Supreme Court of Arkansas in the case of *Bonner* vs. *Board of Directors of the St. Francis Levee District*, 77 Ark., page 519, in which case it was determined that the lands were subject to assessment for State and County taxes. In a foot-note to that case, it is said:

> "Appellee (the defeated party), insisted in its brief that the lands were not subject to taxation, being 'public property and exclusively for public purposes,' within Constitution 1874, Article 16, Section 5."

The character of the St. Francis Levee District was discussed and determined by the Supreme Court of Arkansas in the case of *Carson* vs. *The St. Francis Levee District*, 59 Ark., 513. See also *Memphis Trust Company* vs. *Board of Directors*, etc., 69 Ark., 284, holding that the District was not within the Constitutional prohibition against the issuance of bonds by the State, counties or municipalities, *i. e.*, political subdivisions.

If, under the Swamp Land Act of Congress, of September 20, 1850, the State acquired an equitable or inchoate title to these lands, in our view such title passed to the Levee District and was no longer subject to the control or disposition of the State.

There was a valuable consideration for the granting of these lands from the State to the Levee District. It is fair to assume that the land owners of the District, at the meeting provided for under the Act, in determining whether

they would undertake the burden of constructing these levees and tax themselves for such purpose, had in mind the consideration of the grant of these lands from the State.

The Act of 1893, when acted upon by the tax payers, really constituted a contract between them and the State.

The authorities cited on pages 30 to 35, of the principal brief for Defendant in Error further support these views.

Respectfully submitted,

H. F. ROLESON,

SAMUEL ADAMS,

Attorneys for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

CHAPMAN & DEWEY LUMBER COMPANY AND Chapman & Dewey Land Company, plaintiffs in error,
v.
THE BOARD OF DIRECTORS ST. FRANCIS Levee District.
No. 82.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

SUGGESTION BY THE UNITED STATES.

The Solicitor General on behalf of the United States as *amicus curiæ* respectfully represents to the court:

The lands involved in this controversy, and other similar areas in the State of Arkansas, generally known as "sunk lands" and sometimes erroneously designated as "lakes," were omitted from the original public land surveys. In the year 1908 the Secretary of the Interior, after hearing persons interested, including the parties to this litigation, decided that the "sunk lands" here involved and other areas of like character, not having been surveyed or specifically disposed of, remained the property of the

United States, and accordingly ordered that they be surveyed and held for disposition under the general land laws. See "Arkansas Sunk Lands," 37 L. D., 345, and same case on review, *ib.*, 462. Homestead rights are being asserted to a large part, if not practically all, of these "sunk lands," and suits have been begun by the United States, and others are in immediate prospect, for the purpose of clearing its title against all adverse claims, including such as are asserted by the respective parties to the case at bar. Approximately 40,000 acres will be embraced in these suits.

The record in the present case being silent as to the existence of the Government's claim, this suggestion of it is made, not as bearing upon the merits of the controversy now presented, but as a matter of possible interest to the court in guarding its opinion.

Respectfully submitted.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1913.

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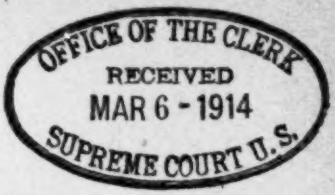

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

No. 82.

CHAPMAN & DEWEY LUMBER COMPANY,
CHAPMAN & DEWEY LAND COMPANY,
Plaintiffs in Error,

vs.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT,
Defendant in Error.

Petition for Rehearing by Defendant in Error.

SAMUEL ADAMS,
H. F. ROLESON,
J. C. HAWTHORNE,
N. F. LAMB,
ATTORNEYS FOR DEFENDANT IN ERROR.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

No. 82.

CHAPMAN & DEWEY LUMBER COMPANY,
CHAPMAN & DEWEY LAND COMPANY,
Plaintiffs in Error,

vs.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT,
Defendant in Error.

Petition for Rehearing by Defendant in Error.

Now comes your petitioner, Board of Directors, St. Francis Levee District, defendants in error herein, and respectfully petitions this Honorable Court for a rehearing of the above entitled cause, for the following several reasons, to-wit:

First. The opinion proceeds on the hypothesis unsupported by the record, and we believe false in fact, that the Governor of Arkansas in his request for the patenting of the township in question stated its acreage.

Second. The opinion is essentially based on what we respectfully submit is an unphilosophical and illogical use of the terms—"surveyed land" and "unsurveyed land."

Third. The effect of this decision will be disastrous upon titles throughout the public land states. A new reservation will be read into all Government patents, whatever their dates, of any land mistakenly included within meander lines by the Government surveyors.

Fourth. The opinion *completely ignores* but in effect overrules the previous decisions of this court and of the Supreme Courts of Louisiana, Indiana, Michigan and Arkansas on the point that a patent of a Government subdivision includes all the land within the description.

Kean v. *Calumet Canal Co.*, 190 U. S. 452.
McDade v. *Bossier Levee District*, 109 La. 626.
Kean v. *Robey*, 145 Ind. 221.
Tolleston Gun Club v. *State*, 141 Ind. 197.
Stoner v. *Rice*, 121 Ind. 51.
People v. *Warner*, 116 Mich. 228.
Chapman & Dewey Co. v. *Levee District*, 100 Ark. 94.

Moreover, the opinion is utterly inconsistent with the following decisions of this court, which it also ignores.

Hardin v. *Jordan*, 140 U. S. 371.
Mitchell v. *Smale*, 140 U. S. 406.
Railroad Co. v. *Schurmeier*, 7 Wall. 272.

Statement Unsupported by the Record.

The opinion in the case at bar makes a statement of fact which we respectfully submit is not warranted by the record. The opinion says: "In requesting the listing the state described the town-

ship as containing 14,329.97 acres." The *record does not show the request of the state for the listing.* It shows merely the certificate of the Surveyor General to the effect that the list "is a true and correct transcript from the originals filed in the office of the Surveyor General by the Governor of the State of Arkansas, *with only such modifications as to make the description of the several tracts agree with the plats on file in this office.*" Inasmuch as it does not appear what these modifications are, it certainly cannot properly be inferred that the acreage was stated in the request of the State of Arkansas. In fact, the fair inference is that the "modifications" introduced were the statements of acreage. However this may be, it seems evident that the statement quoted from the opinion is unsupported by the record.

The phrase immediately following, in the opinion —"the total of the *surveyed* lands as inscribed upon the plat"—is we think misleading. If it only means that on the face of the plat there appears a notation that the "sum of the areas in the above plat" was the acreage stated, it is of course accurate. But that notation seems to us a very different thing from the statement that the acreage stated was "the total of the *surveyed* lands." As pointed out in our brief, the correct addition of the areas of the separate pieces whose areas are shown by the copy of the plat attached to the transcript, is 14,549.72, and that total leaves out the S. ½ of S. E. ¼ of Section 36 and the E. ½ of N. E. ¼ of Section 28. Moreover, the opinion interpolates the word "surveyed," thereby going far toward assuming the

point at issue. The "*sum* of all the areas in the above plat" may well mean an attempt to add the various figures indicating area, or it may mean that it was an attempt to give the area of the entire township. In either interpretation it is a mistake, but neither interpretation justifies, nor do the words themselves, the conclusion apparently drawn that only the pieces as to which areas are indicated on the plat were "surveyed," nor did this court so think in the Kean case (190 U. S. 452), where the situation was in all essentials the same.

"Surveyed" and "Unsurveyed" Lands.

The opinion uses the words "surveyed land" and "unsurveyed land" as if in each case in some way they were expressing characteristics pertaining to the land or its condition, with some analogy to the expressions "cultivated land," "plowed land," or "meadow land," or perhaps a closer analogy to such an expression as "land colored pink on the plat." In other words, something clearly blanketing certain land and as clearly excluding other land. We respectfully submit that the words "surveyed" or "unsurveyed" have no such meaning. The words are not absolute terms, but merely relative ones. No land is wholly "unsurveyed" if it is included within a surveyed line. On the other hand, it is impossible to conceive of lands so thoroughly surveyed that a further survey may not be necessary in order to enable the location on the grounds of some particular description. The calculation of area of a particular piece of land makes it no more "surveyed" than if its area had not been calculated,

as such calculation does not imply traversing the surface of the land but is a mere matter of computation by arithmetic, trigonometry or calculus, as the case may require. When a meander line is run around a body of water or a swamp, the body of water or swamp is just as truly surveyed as is the land above the meander line; its boundaries are ascertained. The area of either piece may or may not be computed. If the survey of the boundary is carefully made the area is a mere matter of mathematical calculation. To term the territory on one side of the meander line "surveyed" and on the other "unsurveyed" is at best a loose use of words. To base decisions in regard to title upon it seems illogical and unjust.

Speaking of the effect of a meander line in *Kean* v. *Calumet,* 190 U. S. 452, at page 459, Mr. Justice HOLMES said:

> "*It does not necessarily import that the tract on the other side of it is not sureveyed.*" (Italics ours.)

Yet the opinion gives it just such import.

Substantial rights of clients should not, we submit, suffer on account of the inartificial use of words either by court or counsel.

It is the established practice to issue patents under the homestead, pre-emption and other acts to, for instance, the Northwest Quarter of the Southeast Quarter of a certain section. Yet, in fact, neither the statute nor the regulations of the Land Office, nor the practice, requires or has ever required, the ascertainment of any part of the boundary of such a piece so described, and no part of

such boundary is, unless in very unusual circumstances in fact surveyed. The survey is confined to running out section lines and establishing quarter section corners thereon. Nothing is done inside the various sections. Not even is the center point monumented or established. Yet the land is not regarded as "unsurveyed" because its boundaries are ascertainable by inference from the surveyed boundaries of the section.

Can the opinion by using the word "unsurveyed" mean anything more than not divided into sections? And what is the importance of lack of division into *sections,* where the conveyance is by townships?

Land in cities is ordinarily surveyed into blocks, each block being divided into lots, a plat showing blocks and lots is recorded and conveyances are thereafter made by reference to such plat. It will be news to the profession generally that a deed of "the whole of Block 8," etc. would not pass the whole of Block 8 because it appeared that on the plat some part of Block 8 was not fully divided into lots.

We are of course aware that Government surveyors frequently note the character of territory included within or traversed by their lines, but this could not have been in the mind of Mr. Justice Van Devanter when he used the term "unsurveyed" as applying to the "sunk lands," for in this regard *the "sunk lands" appear from the plat to be more truly "surveyed" than the lands on the other side of the meanders.*

Effect of the Court's Decision.

If this decision remains the last word of this court on the interpretation of patents in like cases, it becomes in fact the law of the land. Wherever, therefore, surveyor's plats have shown meander lines and those meander lines have included what was at the time of the survey dry land or swamp, such dry land or swamp in each case belongs to the United States unaffected by the patent whose description includes it. Yet, heretofore, people of this country, laymen and lawyers alike, have treated these pieces of land as belonging to the patentees and their assigns. They have been included in warranties of countless deeds; they have been cleared, drained and improved; cities have in part been built on them. *Railroad Co.* v. *Schurmeier*, 7 Wall. 272. All over the public land states titles will be unsettled by this decision. No man will be justified in relying on the record title to land where the Government plat shows a meander line without careful inquiry as to the actual condition of the land at the time of the survey,—an inquiry in the very nature of things growing more and more difficult every day.

Kean v. Calumet and Other Cases.

The case upon which principal reliance was made in our brief, and a case on the authority of which the Supreme Court of Arkansas relied in deciding in favor of the District, was *Kean* v. *Calumet Canal Company*, 190 U. S. 452. The opinion in that case, written by Mr. Justice Holmes, carefully considered the same question here involved and held that a pat-

ent of "fractional sections" conveyed title to the entire sections, parts of which were meandered and in spite of a statement of acreage tremendously less than the total acreage and in fact slightly less than the sum of the acreages above the meander line and in spite of the reference to official plats. This court reached its decision in the Kean case only after the most careful consideration. The case was argued twice, once on October 23, 1901, and the second time on January 9 and 12, 1903. A long dissenting opinion was filed by the Chief Justice and Mr. Justice McKenna. Were not the bar of the country justified in thinking that this court had made up its mind on the question involved and that clients might safely be advised that Mr. Justice Holmes' opinion in that case represented the law as to patents under the swamp land grant?

The present litigation was started a few years after the opinion was rendered in the Kean case. It is certainly fairly to be supposed, as was the fact, that it was started in reliance upon the Kean case. Now we find the highest court in the land rendering a decision upon a question, on which that case was the last and certainly the ruling authority and utterly ignoring that case.

Are not the Supreme Court of Arkansas and counsel for the District entitled to more consideration? We cannot assume that this court reached a decision without considering the authorities cited and earnestly pressed in our brief and in entire forgetfulness of our oral argument. Would not, however, a lawyer who was familiar with the Kean case, but not familiar with the record and arguments in

this case, be justified in assuming from the court's opinion in this case that nowhere in the proceedings leading up to the decision in this court had the Kean case been mentioned, and would he not conclude that counsel in this case had been derelict in duty to their client in failing to bring before this court its previous decision on the same legal questions?

We might, out of the great respect which the decisions of this court command, be forced to the conclusion that we had misapprehended the case and that there was no relation between the questions arising in the Kean case and those in the case at bar, but that can hardly be, for the opinion rendered by Justice Van Devanter follows exactly the reasoning found in the brief of counsel for the defeated party in the Kean case. The first sentence of that brief filed to the October term, 1901, reads as follows: "Under Section 2396 U. S. R. S. the original survey of 1834 did in fact and in law stop at the 'water course' ".

The surveys in the two cases were precisely similar. In the Kean case, as appears from the plat included in the dissenting opinion (page 463) the so-called "lakes" were meandered and were just as much "unsurveyed" as were the "sunk lands" in the case at bar. Yet this court expressly held that the "lakes" were included in the survey so that a description by sections passed title to them, whereas, in this case the court holds that the "sunk lands" which it calls lakes were not included in the survey so that a description by townships excludes them.

There are absolutely but two distinctions to be

drawn between this phase of the Kean case and of the case at bar.

1. In the Kean case, sections were in question. In the case at bar, townships.

2. The Kean case arose in 1895 in Indiana, and the case at bar in 1907 in Arkansas.

The opinion also ignores the decisions of the Indiana Supreme Court *approved and followed by this Court in Kean* v. *Calumet* (*Kean* v. *Roby,* 145 Ind. 221; *Tolleston Gun Club* v. *State,* 141 Ind. 197; *Stower* v. *Rice,* 121 Ind. 51) and of the Supreme Court of Louisiana (*McDade* v. *Bossier Levee Dist.,* 109 La. 626).

Counsel would not have been justified in ignoring the Kean case, and the other decisions. How, then is the court justified? If reported decisions of courts are to be ignored, why should they be reported? Or, indeed, why should they be written? If all cases are to be decided as questions of first instance, there is little excuse for inflicting upon members of a court of review the burden of giving reasons for the conclusions reached. Even if the satisfaction perhaps afforded counsel in a case would be sufficient reason for such a burden, none is left for the publication of such opinions. The only justification for their publication is that they may serve to guide the bar in advising clients, advocates in their work in the courts, and finally, the courts themselves in subsequent cases.

From the record it is disclosed that the selection made by the governor of the State of Arkansas was for the whole Township 12 North, 7 East. The modi-

fication recited in the certified copy of course means the modification made by the Land Commissioner. Under the Act of 1850 the state was entitled to all of the swamp land in that township. The governor selected the whole township. The part meandered out by surveyors was specifically identified as "swamp and overflowed," for the survey itself calls it "sunk land." The state had a right to this land and the governor had selected it. "IT NOT APPEARING OTHERWISE, THE SELECTION MUST BE PRESUMED TO HAVE INCLUDED THE LAND OVERFLOWED, AND IF SO IT WAS CONFIRMED TO THE STATE BY THE ACT OF MARCH 3, 1857," (*Kean* v. *Calumet*, 190 U. S. 452, 460).

THE THREE "ELEMENTS."

The opinion seems to find three "elements" in the description. First, that the description includes "the whole township." Second, that the patent refers to "official plats of survey." Third, that it states an acreage less than the actual acreage of the township. Obviously, the two latter elements are the ones on which the decision was based. It seems self-evident that the reference to a plat in a description must be for the purpose of ascertaining what are the boundaries of the land described. The township, as a township, was as complete whether the interior lines were run or not and when the words "the whole of the township" are used, it seems to us like playing with words to say that they meant anything else. Suppose no interior line had been run, would the patent have been meaningless?

As to the third "element"; the statement of acreage, we can do nothing more than refer to the mass

of authorities cited in our brief to the effect that *a description otherwise clear is never controlled by a false statement of acreage,* and also to the fact argued at length that the acreage question had nothing to do with passing title under the Swamp Land Act, that the only thing with which the Land Office was concerned was the character of the land, not its area.

But in considering these "elements" we are again brought up against the Kean case. Precisely the same elements were present in the patents in that case, with only this modification, that there, instead of speaking of "the whole of township" they speak of "the whole of *fractional* sections." In the patent and in the approved list in the Kean case the acreages were given, and the acreages given were those of the portions above the meander lines. Moreover, the patent in that case had precisely the same words of reference to the Government plats as in the case at bar. The proportion of land above the meander lines was less in the Kean case and the ascertainment of the boundary lines less clear. This all appears from the plat shown on page 24 of the printed Record in the Kean case, (No. 42 Oct. Term 1901; No. 8, Oct. Term 1902), and from the patent shown briefly on page 26 thereof and more at length at page 170 of the original record therein. But it is unnecessary to trouble the court to look up its old files as the matter sufficiently appears in the dissenting opinion in the Kean case (190 U. S., at pages 462 to 464), although the plat there given lacks a few of the details found in the printed record.

It being the fact then that all three "elements"

for the interpretation of this patent mentioned in the opinion occurred in the Kean case, why then does the court come to an opposite result?

We are of course not blind to the fact that the opinion in the Kean case was also based upon the theory of *Hardin* v. *Jordan,* 140 U. S. 371, but that opinion unequivocally held that the patent included the entire sections both above and below the meander line, for it says "The land surrounding the water at least was surveyed, so that *the identification of the submerged portion was absolute.*" We confidently submit that there is no theory of law under which, where a court gives two reasons for a conclusion, one may be picked out as authority and the other rejected.

In reading the opinion in this case one would get the impression that there was something unusual in the reference to "official plats" in this particular patent, something which justified interpreting this patent differently from other patents issued by the Government. The contrary, of course, is the fact. The reference to these plats occurs, we venture to state, in every patent issued by the Government where the description is expressed in townships, in sections, or in parts of sections.

Why should this reference now suddenly assume gargantuan proportions in the mind of the court and impel it to reverse the heretofore accepted construction?

There is nothing new in the presence of the third "element" either alone or in connection with the second. For many years the Land Office in patent-

ing lands intersected with waters and swamps has been accustomed in its patents both to refer to the plats and to state an acreage corresponding approximately to the acreage of the lands above the meander lines. This court has repeatedly held that the meander lines themselves and the acreages found or guessed at existed merely for the purpose of determining how much a purchaser from the Government should pay and that they did not control the description.

See

Hardin v. *Jordan,* 140 U. S. 371, 380.

INTERPRETATION BY THIS COURT OF SWAMP LAND ACT.

The Swamp Land Act was passed in 1850. Selections under it were confirmed in 1857. Whatever rights the states derived under these two acts must have accrued at the time of their approval. Something was granted to the states. That something was not a general governmental or political principle, in its nature subject to development, fluctuation or change with the general development of civilization and law, but was a right of some nature in and to swamp lands. The interpretation of that act, therefore, was the establishment of a rule of property. Yet, if any right has suffered from the changing decisions of this court it is the right acquired by the states under this grant.

This court has persistently called the grant a grant *in praesenti.* It first held that the *title* to the land passed by virtue of the grant itself *Martin* v. *Marks,* 97 U. S. 345; *Rice* v. *Railroad Co.,* 110 U. S.

695; *Wright* v. *Roseberry,* 121 U. S. 488; *Tubbs* v. *Wilhoit,* 138 U. S. 134; *Irwin* v. *San Francisco Savings Union,* 136 U. S. 578. Later it held that while the legal title was in the United States equitable right passed to the state. *Brown* v. *Hitchcock,* 173 U. S. 473. Still later that equitable title has dwindled to a mere "inchoate right." So that now the situation seems to be that the Swamp Land Act was a grant *in praesenti of an inchoate right*—a seemingly meaningless phrase.

Moreover, this court held in the case of *Mitchell* v. *Smale,* 140 U. S. 406, 413, that while it was possible for the Land Department, to issue a patent reserving lands within a meander line inside a surveyed section, if the description in the patent were so limited by "express" words, yet that could not be done in a patent to a state under the Swamp Land Grant. Now the court proposes to hold not only that, speaking generally, a United States grant will be interpreted as stopping at a meander line found inside the outer boundaries of the description, but that this is the result in grants to states under the Swamp Land Act where there are no such express words of limitation, but words—*the whole of the township*—expressing a directly contrary intent.

The majority of this court in the case of *Muhlker* v. *New York & H. R. Co.,* 197 U. S. 544, disapproved to the extent of reversal of a somewhat similar right-about-face on the part of the Court of Appeals of New York. This court has frequently announced its general allegiance to the principle of *stare decisis.* We realize that this court is not absolutely

bound by such principle, and in fact that it is of importance to the best interests of the country that it should not be so absolutely bound. We realize that the power of this court to decide a case according to its best judgment is, and should be, unlimited. "It is excellent to have a giant's strength," but we respectfully submit that in this case the court proposes to use its power without having sufficiently considered either the logical basis of its determination, the effect thereof, or the state of the law as found in its own prior decisions, and those of the highest courts of the states.

WHEREFORE your petitioner prays this Honorable Court for an order granting a rehearing of said cause, and that your petitioner may have such other relief as may be just.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT.

H. F. ROLESON,
J. C. HAWTHORNE,
N. F. LAMB,
Attorneys.

SAMUEL ADAMS,
Of Counsel.

I, Samuel Adams, counsel for the Board of Directors St. Francis Levee District, defendant in error and the above petitioner, do hereby certify that the foregoing petition for rehearing is not interposed for delay, and in my judgment said petition is well founded, and the order herein prayed for should be granted.

SAMUEL ADAMS.